

EMPOWERING PEOPLE WITH DISABILITIES

A Comparative Study of Disability Legislation **May 2015**







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Stefanus Haryanto and Julius Omrie Napitupulu

CAMPOS MELLO ADVOGADOS

Daniela Raigorodsky Monteiro, Marcela Nunes and Paula Mariozzi



Dania Duncan, Carlos Valencia, Gabriel Salinas, Javier Zenteno and Mario Rea



Javier Ramírez, Marisa Nieto-Márquez, Luca Galantucci, Francesca Onofri, Laura Pavese, Laura Rigo and Félix Fernández Hinojal



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Vidya Sagar is a voluntary organization based in Chennai, Tamil Nadu, India. The organization works with children and young adults with cerebral palsy and other neurological disabilities, their families and the communities they live in.

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FOREWORD

People with disabilities constitute the world's largest minority group. More than one billion people live with some form of disability. Disability disproportionately affects vulnerable populations: roughly eighty percent of people with disabilities live in developing countries, where the poor, women, and older people suffer a higher prevalence of disability. Statistics show a steady increase in these numbers.

The UN Convention on the Rights of Persons with Disabilities – which has been ratified by over 150 states – calls on countries to ensure that people with disabilities are entitled to the full enjoyment of their human rights and are given equal treatment under the law. However, across the world, people with disabilities remain vulnerable to violence and face barriers to accessing justice, education, healthcare and employment.

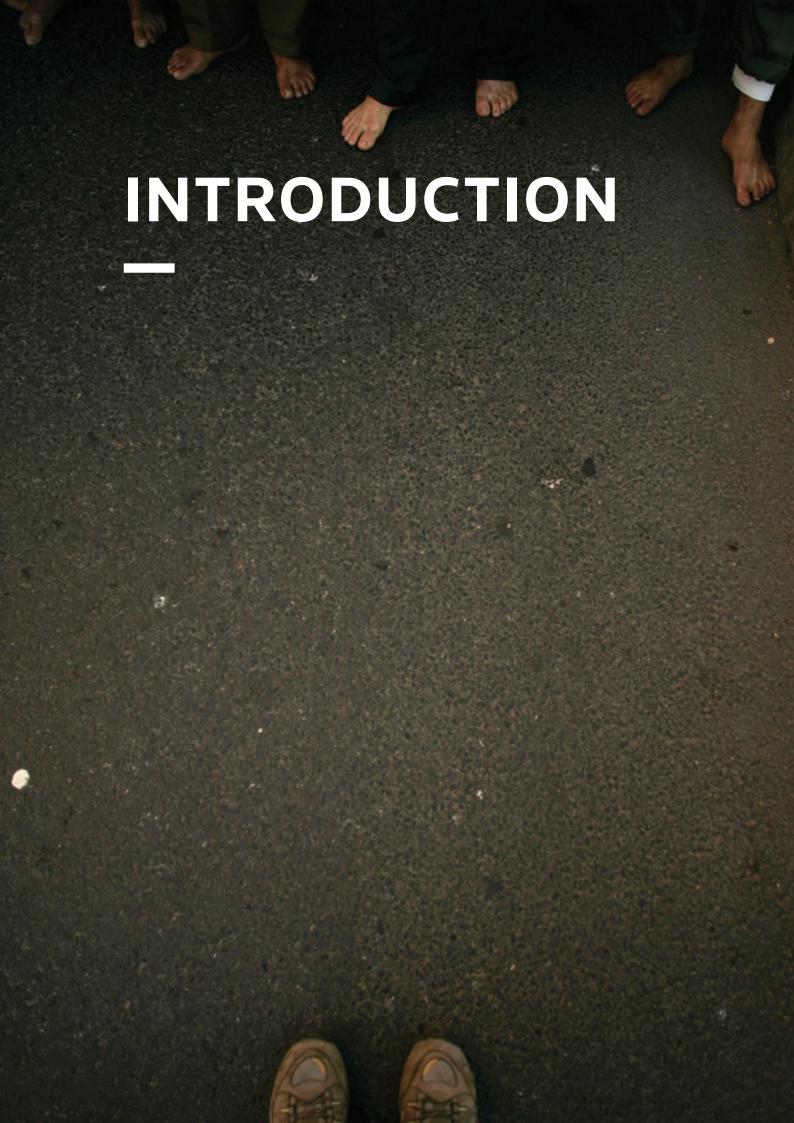
A significant obstacle to real progress in the disability sector is the weakness of domestic legislation for the protection and empowerment of people with disabilities. Studies on disability legislation show that less than 50 countries have anti-discrimination and other disability-specific laws.

At the Thomson Reuters Foundation we have an unwavering commitment to strengthening human rights through the rule of law. Through TrustLaw, our global pro bono service, we connect leading law firms and corporate teams around the world with NGOs and social enterprises in need of free legal assistance on pressing global issues or to support their legal needs.

TrustLaw is proud to present this guide, which offers a comparative analysis of the laws governing disability and the implementation of the UNCRPD in eleven countries spanning five continents. This guide makes a notable contribution to our understanding of how different countries interpret and apply 'legal capacity' of people with disabilities, and it highlights best practices that can guide advocacy efforts for legal reform.

This guide is the result of a close collaboration between the Thomson Reuters Foundation, Vidya Sagar, and a team of dedicated lawyers around the world. Linklaters played a leading role in producing the guide, together with DLA Piper, Hewlett Packard Company, HSBC, Bruchou Fernandez Madero & Lombardi, Campos Mello Advogados, Adnan Kelana Haryanto & Hermanto and Webber Wentzel. We are incredibly grateful to the contributing teams of lawyers for committing their time and expertise to make this guide possible.

We hope this guide will become an invaluable tool to support advocates, policy-makers, legislators, and practitioners in their efforts to improve the laws and policies of the disability sector.



India is home to an estimated 40-60 million people with disabilities, where they face ongoing segregation and discrimination. Although India was among the first to ratify the UN Convention on the Rights of Persons with Disabilities ("CRPD") in 2007, it has yet to adopt adequate legislation that ensures that the rights of this population are respected and that they have equal access to services.

The CRPD requires state parties to, among other things, provide for full legal capacity of all persons with disabilities on an equal basis with others and to take measures to support and enable persons with disabilities to exercise full legal capacity. Legal capacity is understood as an individual's capacity to act and be recognized as a person before the law; it is the most fundamental right that intersects with all aspects of one's life.

However, persons with disabilities in India and across the globe, suffer situations where they are marginalized and deprived of their capacity under the law. In particular, people with developmental/intellectual/psycho-social disabilities are often assumed to be incapable to make decisions with respect to their person, family and community, which leads to significant limitations in their ability to enter into any business or legal contract – such as those relating to banking, insurance, employment, management of property, assets, finances – or to be recognized as a legal person for the purposes of inheritance of family property, making a will, having access to legal remedies, to be a witness before the court of law, to appoint one's own legal counsel, or to enter into marriage, civil partnership, parenthood and adoption. They are also assumed to be unable to make decisions or give consent in matters involving medical treatment, sexual relations, sterilization, or abortion, or to take part in political processes by voting or standing for elections.

Vidya Sagar, a non-governmental organisation working on cross-disability advocacy, has been actively lobbying for a new disability legislation in India that is rights-based and grounded in the principles of the CRPD, including, for example, non-discrimination, equality of opportunity, and respect for inherent dignity, individual autonomy and independence of people with disabilities. India's new Rights of Persons with Disabilities Bill 2014 could not be passed by the Parliament as many Indian advocacy groups felt that it did not provide for full legal capacity for persons with disabilities, nor contained satisfactory anti-discriminatory provisions. A lobby group, of which Vidya Sagar is an active contributor, pushed for the bill to be reviewed by a Parliamentary Select Committee.

Vidya Sagar partnered with TrustLaw, the Thomson Reuters Foundation's global pro bono service, to conduct a cross-border legal analysis of disability laws in eleven countries spanning five continents to understand how they these diverse jurisdictions treat legal capacity of persons with disabilities in their legislations and judicial proceedings. Through TrustLaw, Vidya Sagar was connected with lawyers from Linklaters, who played a leading role in producing the report, together with Adnan Kelana Haryanto & Hermanto, Bruchou Fernandez Madero & Lombardi, Campos Mello Advogados, DLA Piper, HSBC, Hewlett Packard Company and Webber Wentzel. This study will be a vital tool for the disability sector in India to lobby for the effective recognition of full legal capacity in any new disability legislation, and to advocate for amendments in other legislation dealing with legal capacity of people, in line with the CRPD.



UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES - KEY POINTS

Under the CRPD, adhering countries should:

- recognise that all persons are equal before the law, prohibit discrimination on the basis of disability and guarantee legal protection against discrimination (Article 5)
- allow persons with disabilities to access their physical environment, transport, public services and information and communications technologies (Article 9)
- ensure that persons with disabilities are recognised before the law, support persons with disabilities so that they can exercise their legal capacity in a way which is proportional and tailored to the circumstances of a person with disabilities with safeguards against abuse and recognise that persons with disabilities have an equal right to own and inherit property, to control their own financial affairs, to have equal access to bank loans, credit and mortgages and not to be arbitrarily deprived of their property (Article 12)
- ensure access to justice on an equal basis with others (Article 13)
- make sure that persons with disabilities are not deprived of their liberty unlawfully or arbitrarily (Article 14)
- guarantee freedom from torture and from cruel, inhuman or degrading treatment or punishment and prohibit medical or scientific experiments without the free consent of the person concerned (Article 15)
- allow persons with disabilities to live independently, be included in the community and have access to support (Article 19)
- foster personal mobility and independence (Article 20)
- promote access to information through accessible formats and technologies (Article 21)
- respect the rights of persons with disabilities to marry and found a family, ensure that persons with disabilities have equal rights and responsibilities regarding guardianship, wardship, trusteeship and the adoption of children and support children with disabilities and their families (Article 23)
- ensure equal access to education and vocational training (Article 24)
- provide access to the highest attainable standard of health, without discrimination on the basis of disability, including in the provision of health insurance (Article 25)
- prohibit employment discrimination, promote self-employment, employ persons with disabilities in the public sector, promote their employment in the private sector and ensure that they are provided with reasonable accommodation at work (Article 27)
- recognise the right to an adequate standard of living and social protection (Article 28)
- ensure that persons with disabilities can take part equally in political and public life, including by having the right to vote, stand for elections and hold public office (Article 29)
- promote participation by persons with disabilities in cultural life, recreation, leisure and sport (Article 30)

IMPLEMENTATION OF ARTICLE 12 OF THE CRPD

Has Article 12 of CRPD been ratified? if yes, how so?

ARGENTINA

Yes. The CRPD was ratified by Argentina in 2008 and approved locally through Law N° 26.378 passed by National Congress and promulgated by the Executive (June 2008). It is a federal constitutional law, with automatic and operational force throughout the country.

BRAZIL

Yes. The CRPD was ratified by Brazil in 2008 and incorporated into Brazilian Law in 2009, by Decree n. 6949. Such is the importance of the treaty in Brazil that it was received with the status of constitutional rule.

ENGLAND & WALES

Yes. In 2009 the CRPD was ratified and declared to be a Community treaty within the definition of the European Communities Act 1972. However, since the UK has not incorporated the CRPD into domestic law, individuals may not rely on it in court, although it can be used as an interpretive tool in relation to the Human Rights Act 1998. The Mental Capacity Act 2005 is also said to be incompatible with the CRPD because it allows for substituted decision making.

FRANCE

Yes. France ratified the CRPD on 18 February 2010. The French Senate confirmed that no further changes to French legislation were necessary to implement Article 12, given that the French law reforms made in 2007 already reflected the main principles set out in the CRPD.

GERMANY

Yes, it was ratified and entered into force in 2009.

INDONESIA

Yes, the CRPD was ratified in 2011. However existing Indonesian legislation is incompatible in some respects in that a substituted rather than a supported decision-making scheme is in force for persons with disabilities under conservatorship (guardianship). Conservatorship is not clearly regulated nor is it subject to regular review.

ITALY

Yes. The CRPD was ratified by Italy in 2009, alongside the creation of a National Observatory to promote enforcement of the CRPD.

MEXICO

Yes. The CRPD has been signed, ratified (in 2007), and incorporated to the "Constitutionality Block" contained in article 1 of Mexican Constitution. This Constitutionality Block implies that the human rights provisions contained in the Mexican Constitution and the treaties which Mexico is a part of, regarding human rights, will be considered in the top of the normative hierarchy.

POLAND

Yes. Poland ratified the CRPD in 2012, but made one interpretation and two reservations. The interpretation concerns the continued use of incapacitation in the manner and under the circumstances prescribed by national law when as a result of mental illness, mental retardation or other mental disorders a person is not able to control his conduct. The reservations concern the right of all persons with disabilities of marriageable age to marry and found a family and the right to abortion.

SOUTH AFRICA

Yes, the CRPD was ratified in 2007.

SPAIN

Yes. The CRPD was ratified in 2007. The CRPD's provisions have not been incorporated into domestic law. As a result, complete effectiveness is not guaranteed. However, the Spanish Supreme Court has ruled that the current system is compatible if construed in accordance with certain principles.

LAW RELATING TO RIGHTS OF PERSONS WITH DISABILITIES

What laws, if any, exist relating to persons with disabilities?

ARGENTINA

The Argentine Civil Code provides the main legal framework to act on behalf of adults who lack the capacity to undertake certain decisions for themselves. Capacity is construed as a rule, while disabilities and restrictions must be expressly mentioned by law as exceptions. The basic status of mentally disabled people is capacity, in accordance with the rule set forth by Section 152 bis of the Argentine Civil Code. Therefore, notwithstanding certain inter vivo acts of disposition and acts of management specifically prohibited by a judgment stating disability, persons with disabilities can carry out all sorts of legal acts.

BRAZIL

In Brazil, there are many laws related to persons with disabilities, such as laws relating to social integration, financial inclusion, and adopting a national programme of human rights.

ENGLAND & WALES

The Mental Capacity Act 2005 provides the main legal framework. It allows courts to make findings of incapacity and hand over decision-making to a welfare deputy (although their powers and duration should be limited). The test for capacity involves both a diagnostic test and a functioning test. Alternatively, a person lacking capacity may grant their own lasting power of attorney.

FRANCE

The basic rights and freedoms of a person with disabilities are protected by the French Civil Code. Every person is assumed to have capacity. Disability –itself - does not mean a lack of capacity. Lack of capacity can only be identified by way of a judicial request which may be submitted by certain people requested the judge for a protection procedure to be applied. The law provides for three categories of protection: judicial safeguard (caretaking where full capacity of the person with disabilities is assumed but in which the judge can nevertheless rescind contracts prejudicial to the person with disabilities in cases of temporary reduction of capacities); curatorship (where partial capacity is assumed for certain civil acts); or tutorship (which provides full guardianship for every civil act). A family council may be established for effective protection if the family permits it.

GERMANY

All persons, including persons with disabilities, must be assumed to have legal capacity. Persons with disabilities bear equal rights and obligations to all persons. If a person with disabilities is under a permanent state of pathological mental disturbance which prevents the exercise of free will, the law would provide for the protection of the person with disabilities.

INDONESIA

Indonesian law provides for equal rights in every aspect of life and livelihood for persons with disabilities. For those persons with disabilities who are judged not to have capacity to decide for themselves, there is a mechanism for being placed into conservatorship, which is similar to quardianship.

ITALY

A general framework exists for the protection of persons with disabilities, which includes protection of dignity, freedom and independence as well as assisting persons with disabilities to access services under Law No.104/1992. There are three regimes for protection of persons with disabilities: (i) the legal incapacitation regime where the person with disabilities does not have any legal capacity; (ii) the limited legal capacity regime, which permits the person with disabilities to carry out certain ordinary administrative acts without the assistance of a guardian; and (iii) the trusteeship regime which provides for the person with disabilities to be assisted by a trustee in relation to decisions about his or her interests.

MEXICO

The General Law for the Inclusion of Individuals with Disabilities provides the main legal framework and prohibits any distinction, exclusion, or restriction due to disability, that has the purpose or effect to hinder, jeopardize, or leave without any effect the recognition, enjoyment, or exercise, in equal conditions, of all human rights and fundamental freedoms.

POLAND

The Polish Civil Code provides the main legal framework for adults who may lack capacity to decide for themselves. It allows courts to declare full or partial incapacitation of persons with disabilities. Under the constitution, persons with disabilities have the right to non-discrimination.

SOUTH AFRICA

A person who is deemed to be incapable of managing his or her affairs could have an administrator appointed to care for him/her and administer his/her property. The South African constitution guarantees equality before the law.

SPAIN

Three guardianship regimes exist under the Spanish Civil Code: full, limited (in general providing assistance in economic matters) and judicial defender. The law prohibits discrimination against persons with disabilities

ENTERING INTO CONTRACTS

Can a person with disabilities enter into contracts?

Are there any prerequisites?

ARGENTINA

An individual can be prevented from entering into contracts when his/her mental abilities have decreased and a judge considers that the exercise of his/her full capacity could cause damage to his/her person or property. The disabled individual may carry out administrative acts, except those which the judge has limited, considering the circumstances, as requiring prior confirmation from the guardian.

BRAZIL

People with mental disabilities cannot control their own financial matters by themselves, and all civil acts, including financial contracts (bank loans, etc.), must be performed with the assistance/representation of the guardian.

ENGLAND & WALES

Yes. The court looks to whether the individual has the insight and understanding relevant to the decision to enter into the contract, including to retain information and use or weigh that information as part of the process of making the decision. However, the court favours a person with disabilities retaining some level of control if possible.

FRANCE

A person with disabilities under safeguard can enter into contracts. Under curatorship, a person with disabilities may enter into certain contracts but not others as defined by the judge in accordance with a decree defining the types of contracts. Under tutorship, a person with disabilities may not enter into contracts except under representation, though it is possible to draft or revoke a will or other contracts on a list of exceptions, which may be prepared by the judge, or for day-to-day contracts of low value.

GERMANY

A person with disabilities in a permanent state of pathological mental disturbance that prevents the exercise of free will be considered incapable of entering into contracts but a person of full age who lacks legal capacity can enter into contracts with the assistance of the legal guardian. The guardian has comprehensive statutory power of representation and can represent the PWD in and outside of court (including the power to enter into contracts on behalf of the PWD). The guardian will enforce the rights of the person with

disabilities incapable of contracting by representing him/her. A person with disabilities may always enter into day-to-day, low value contracts or in the case of a declaration of intent conferring legal advantage for the person with disabilities. Concerning testamentary capacity, if the person with disabilities is incapable of understanding the consequences of his/her declaration s/he is considered incapable of drawing up a will but PWDs have full capacity to inherit. In case the PWD is not able to take care of and dispense the inheritance on his/her own, a guardian will be appointed to do this on behalf of the PWD.

INDONESIA

All persons with disabilities except those placed under conservatorship have the right to enter into contracts. The Indonesian Civil Code states that persons with disabilities have a status equal to a minor and are thus ineligible to conduct legal actions and must consequently be represented by the conservator.

ITALY

Yes. Except in certain circumstances a person with disabilities can enter into contracts. However, if declared legally incapacitated or subject to the limited legal capacity regime the contract is terminated. Persons with disabilities whether physical or mental are protected in relation to employment contracts as they have the right not to be dismissed because of their disability.

MEXICO

The general rule is that everybody can enter into agreements and carry out legal acts. An exception to the rule provides that a person with disabilities cannot perform acts of management or enter into agreements with the prior authorisation of his/her legal guardian.

POLAND

Persons declared fully incapacitated cannot enter into contracts. All other persons with disability have full rights.

SOUTH AFRICA

There is a rebuttable presumption in South African law that everyone is capable of entering into contracts. It would be for an individual alleging that someone did not have capacity to contract to prove this in a court of law should they wish to invalidate a contract entered into by a mentally and/or intellectually disabled individual. South African law precludes a person from entering into legal contracts independently if he or she is mentally so constrained that he or she cannot understand the nature, purport and consequences of his or her actions, (referred to as being of "unsound mind"). The court may declare such a contract void and an order may also be made that a person is of unsound mind generally.

SPAIN

As part of legislation relating to "intimate personal rights", if legally incapacitated persons with disabilities have sufficient understanding of the decision to be taken, supported by medical opinion, they have the right to make a will. However, legally incapacitated persons with disabilities cannot enter into other contracts without representation by their guardian. For acts that go beyond the merely administrative such as opening bank accounts, depositing and withdrawing money, judicial authorisation is required as well. To enter into an employment contract a person must have full legal capacity, thus incapacitated persons with disabilities must receive consent from their guardian to enter into an employment contract.

FAMILY

In what circumstances can a person with disabilities be prevented from having children / consenting to marry?

ARGENTINA

Regarding marriage, the contracting parties must be able to express their own free will. Where both parents were disabled, the minors shall be subject to guardianship. Regarding abortion, this shall not be punishable in case the mentally disabled woman is pregnant as a result of rape and the physician has the woman's consent. However, the consent of the legal guardian is always required. The legal guardian's functions are solely of assistance, and decisions such as forced sterilisation which limit procreation are strictly personal and non-transferable rights.

BRAZIL

Marriage could be declared null if the judge decides that the person with disabilities does not understand the nature of the marriage contract (including sexual relations) and the duties and responsibilities attached to it.

ENGLAND & WALES

A person with disabilities can be prevented from consenting to marriage if the court decides that the individual does not understand the nature of the marriage contract (including sexual relations) and the duties and responsibilities attached to it. The court may also take away a child of a person with disabilities if it is satisfied that the child is likely to suffer significant harm, although the fact that a more beneficial environment exists is not sufficient to establish 'significant harm'. A pregnancy may be terminated where issues of capacity and best interests are beyond doubt and an application to court is not always necessary.

FRANCE

An adult under curatorship may only get married or enter into civil partnership with consent from the curator or, if this is not possible, from the judge. An adult under tutorship can only get married or enter into civil partnership with the authorisation of the judge when there is no doubt of the consent of the person with disabilities to the marriage in the long term. An abortion may be imposed if the person with disabilities is unable to consent and her state necessitates a therapeutic intervention. Necessity is determined by doctors and a multidisciplinary team.

Sterilisation for contraceptive purposes will only be permitted if there is absolute medical objection or impossibility to implement other contraceptive measures as decided by the judge.

GERMANY

A person with disabilities cannot be prevented from entering into marriage or a civil partnership unless they do not understand the nature of marriage. Intellectual abilities are not necessarily decisive. A guardian cannot consent to marriage on behalf of a person with disabilities as marriage consent is considered an inherent personal right. Person with disabilities have the right to request sterilisation. A guardian may consent to sterilisation on behalf of a person with disabilities in certain circumstances and subject to certain requirements. Approval by the guardianship court must be obtained based on expert medical opinion.

INDONESIA

Persons with disabilities under conservatorship are prevented from marrying due to their status as a minor. Their conservator cannot grant consent on their behalf. The conservator would be responsible for the minor children of a person with disabilities if they are the sole guardian of the children.

ITALY

A person with disabilities can be prevented from consenting to marriage if they are declared legally incapacitated under the Italian Civil Code. This does not apply to the limited legal capacity or trusteeship regimes. Persons with disabilities are not prevented from adopting children and in fact priority is given to them in order to promote social inclusion but presumably if someone has been legally incapacitated or has limited legal capacity, then they would not be permitted to adopt.

MEXICO

A person with disabilities cannot get married, since legal capacity (as defined in Mexican laws) is required to get married. The ratio legis behind this attends to the impossibility of incapacitated people to develop a "legal will" that allows them to properly decide whether they want to get married or not. The court may also take away a child of a person with disabilities if it is satisfied that the child is likely to suffer harm or it is deemed that the child is not properly taken care of.

POLAND

Persons declared fully incapacitated cannot enter into marriage. Other persons with disabilities affected by mental illness or retardation are also prevented from entering into marriage unless the court determines that their mental condition would not pose a threat to the marriage or to the health of any future children. Persons with disabilities who have not fully been incapacitated may adopt. Due to the reservation made by Poland to the CRPD, the right to abortion for persons with disabilities is not implied under Polish law.

SOUTH AFRICA

All persons can enter into marriage, with the exception of those who at the time of the marriage are unable, owing to mental and/or intellectual disability, to understand the nature of the juristic act of entering into a marriage and to appreciate the duties and responsibilities marriage creates, or who is motivated or influenced by delusions caused by mental illness. Its is an offence to have sexual relations with a person who is mentally disabled (within the meaning of the applicable law). Persons with disabilities may adopt unless they are not considered 'fit' within the meaning of the law. Abortion is only permitted under certain circumstances where the person with disabilities is unable to understand the consequences of termination of her pregnancy.

SPAIN

As part of legislation relating to "intimate personal rights", if legally incapacitated persons with disabilities have sufficient understanding of the decision to be taken, supported by medical opinion, they have the right to marry, to recognition of a child as their own, to abortion and to sterilisation. In cases where sufficient understanding is not present, judicial approval is required for persons with disabilities to recognise extra-marital offspring and requires parental authority to be exercised by the non-person with disabilities parent. Taking into account the best interests of the incapacitated person with disabilities, sterilisation may be authorised by a court. Without such authorisation it is punishable by law.

DISCRIMINATION

What protections exist in relation to discrimination against a person with disabilities?

ARGENTINA

Discrimination laws apply even prior to the formation of an employment relationship and employers are prohibited from discriminating against persons with disabilities. Moreover, the State shall ensure that employers provide all technical assistance and training programs necessary for the effective integration of persons with disabilities to their jobs.

BRAZIL

Brazilian law forbids discrimination against persons with disabilities in the provision and use of public goods and services, also with respect to wages and hiring criteria of workers with disabilities.

ENGLAND & WALES

An employer may not discriminate or victimise when deciding whether to employ a person with disabilities and an employee may not be made redundant purely for being a person with disabilities. Employers must make reasonable adjustments to avoid a person with disabilities being put at a disadvantage in the workplace. An employer may also only make enquiries about the health or disability of a potential employee in limited circumstances (i.e. only if it will benefit the employee).

FRANCE

Discrimination is prohibited in the application process except if a doctor has pointed out an incompatibility between the disability and the job applied for. Employers must also facilitate progress within the company and offer tailored training for a person with disabilities if expenses for such measures are not disproportionate.

GERMANY

The German constitution provides that no person with disabilities shall be discriminated against. Unless such action would require disproportionate efforts on the part of the employer, disability friendly infrastructure must exist in workplace design, environment, organisation and work hours.

INDONESIA

All persons with disabilities have the right to nondiscrimination as a consumer of goods and services. All persons with disabilities who are physically and mentally healthy have equal right to employment, though the type and degree of disability may be taken into account (although the same wages must be paid for the same job). A medical certificate may be needed to certify that the person with disabilities is "physically and mentally healthy". This implies that persons who may not be certified as mentally healthy may have difficulties with employment.

ITALY

Persons with disabilities falling subject to discrimination can be protected by way of a specific fast track civil trial procedure, which aims to be a more efficient form of relief for the person with disabilities. In such instances of discrimination, the burden of proof falls upon the defendant to prove that they did not discriminate against the person with disabilities.

MEXICO

The Federal Labour Law sets forth the obligation to procure a "dignifying work", provided that this is to respect the human dignity and not generate any discrimination due to disabilities. Likewise, the law incorporates within the equity in employment principle the prohibition to carry out prejudicial distinctions between employees due to any type of disability suffered.

POLAND

All persons with disabilities have the right to non-discrimination in relation to services, including incapacitated persons represented by their guardians. Incapacitated persons with disabilities may not enter into employment contracts. Legislation establishes degrees of disability in relation to employer obligations, including stipulations for adapting the workplace. Financial incentives promote employers hiring persons with disabilities.

SOUTH AFRICA

The law specifically provides that no person may unfairly discriminate against any person on the ground of disability. The Constitution also provides for affirmative action for persons with disabilities to promote substantive equality. In the employment sphere, the law provides that no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including disability.

SPAIN

Spanish law forbids discrimination against persons with disabilities in the provision and use of public goods and services, although differences in treatment are admissible if justified, appropriate, proportionate and necessary. Persons with disabilities are protected against discrimination in employment with nuanced provisions made for private/public sector, sheltered/self employment.

GUARDIANSHIP

In what circumstances will a guardian be appointed? Can this be challenged by the person with disabilities?

ARGENTINA

A guardian shall be appointed where an individual is declared disabled under the terms of Section 152 bis subsection 2° of the Civil Code. Persons with disabilities in these instances are considered to be minors as to their persons and property. The appointment of a guardian can be challenged by the person with disabilities, and the Public Ministry will be involved.

BRAZIL

In Brazil, the declaration of incapacity is judicial. In this sense, to declare a person incapable of performing civil acts, due to a mental disability, it is necessary to file a suit of interdiction, which must follow due process. It is in this process that a guardian is appointed. The person with disabilities has the right to impugn the interdiction and will be able to retain an attorney.

ENGLAND & WALES

Under the Mental Health Act 1983, a guardian will be appointed if it can be shown that the patient is suffering from a mental disorder and it is necessary in the interests of the welfare of the patient, or for the protection of others. The legislation provides the person with disabilities with a right to challenge this decision.

FRANCE

A guardian is appointed if a person cannot provide for his/her own interests because of a medically certified alteration of mental or physical attributes likely to prevent the expression of his/her will. The person with disabilities may express their opinion at the hearing to put in place a protection procedure and be accompanied by a lawyer. The person with disabilities may choose their guardian.

GERMANY

When persons with disabilities capacity to enforce and execute their own rights and obligations is limited, a guardian is appointed by the court to take care of matters to the extent necessary. Person with disabilities must be consulted by the court, and their wishes must be considered when appointing a guardian. A legal guardian may not be appointed against the free will (defined as the ability to understand the reason for the guardianship, its meaning

and extent, manifested in the ability to identify and assess his/her own mental deficits) of the person affected. If the person affected refuses to accept a legal guardian, the courts must consider whether such refusal is based on that person's free will.

INDONESIA

The court grants conservatorship upon the request of another person when the adult is judged to be in a continuous state of "simple mindedness, insanity or rage". The continuous state is pronounced on hearing evidence, questioning the person with disabilities and examination by a mental health expert during the proceedings. It shall be terminated "when the reasons for which it was put into place are terminated", effective following a court decision.

ITALY

A guardian will be appointed if a person with disabilities has been declared legally incapacitated in accordance with the Italian civil code due to permanent or serious mental disability and loss of faculties. The person with disabilities must be heard before he is declared incapacitated.

MEXICO

Persons with disabilities will only be able to enter into agreements through a legal guardian, known in Mexico as a "tutor". The legal guardian has to carry out all the proper actions regarding the incapacitated person as well as the administration of his/her goods. Tutors have to guarantee their administration with a pledge, which will be executed in case they do not perform their role in line with the best interests of the person with disabilities.

POLAND

A guardian is appointed by a panel of three judges after an evidentiary hearing and the consideration of two independent medical opinions. In the case of full incapacitation, the court appoints a guardian supervised by the court of protection who provides guidelines and recommendations. Incapacitation continues until set aside by the court by petition filed by the representative and the incapacitated person or by ruling by a court acting ex officio. In the case of partial incapacitation, a custodian is appointed. A custodian may also be appointed for disabled persons as needed and can be terminated at any time at the request of the disabled person.

SOUTH AFRICA

A court may appoint an administrator for a mentally ill person or a person with severe or profound intellectual disability.

SPAIN

A person with disabilities is declared incapacitated by a judge due to persistent physical or psychiatric disability preventing the person with disabilities from governing him/herself. Persons with disabilities may appoint their own representation. The judge is not obliged to take the preferences of the person with disabilities into account when deciding on their capacity, the decision being solely based on medical criteria. The judgement must set out the extent of the restriction on legal capacity corresponding to a personalised guardianship regime.

HEALTH

Is consent required to treat or detain a person with disabilities?

ARGENTINA

Yes. Health care is a strictly personal and non -transferable right for persons with disabilities who, in general, are able to provide their informed consent, except in the case of dementia. The National Ministry of Health is responsible for developing plans, activities with non-profit organizations and to issue a Unique Disability Certificate. It officially states the existence of the disability, its nature and extent, the possibilities of rehabilitation of the affected individual and indicates what type of work or professional activity could be performed by him/her.

BRAZIL

If the patient is judicially considered unable to understand his/her situation or to decide for him/herself, consent must be granted by a legal representative, appointed by a judge and, the consent of the patient is not necessary. A person with disabilities can challenge a decision taken, but it must be done before a court. If the judge considers that the person with disabilities can understand his/her medical situation and decide for him/herself, the consent of the person with disabilities will be necessary.

ENGLAND & WALES

No. A person with disabilities may be detained if they lack the capacity to give informed consent and the hospital/ care home managers consider it to be in the best interests of the person with disabilities. Two approved mental health professionals must make this recommendation.

FRANCE

Yes, consent is required if the person with disabilities is capable of expressing his/her own will. If not, no medical act / treatment may be carried out without consulting a third party of confidence or the family. No decision may be made which could cause physical harm or interfere with the person with disabilities private life. A tutor or curator is entitled to take measures that are necessary to stop any danger caused by the behaviour of the person with disabilities. In this case, the judge or family council must be notified. If a person with mental disorders does not give consent for treatment, restrictions to individual freedom must be adapted necessary and proportionate to health, preserving dignity in all circumstances.

GERMANY

Where a person with disabilities has not been placed under guardianship consent from the person with disabilities is required. Consent from the guardian is required where a guardian has been appointed. In certain circumstances consent from the court is required in addition. If the guardian refuses consent, the doctor must then seek consent from the court.

INDONESIA

Treatment shall be carried out by an authorized medical worker, for mental disabilities in authorized treatment centres, with respect for the human rights of the person with disabilities. There is no mention in the law concerning the necessity for consent.

ITALY

Persons with disabilities who have been declared incapacitated must be guaranteed medical treatment. Interruption of such treatment will only be permitted by the court if the factual evidence shows that this is in line with the wishes of the person with disabilities or there is scientific evidence that the condition is irreversible. Other persons with disabilities must consent to their treatment.

MEXICO

No. A person with disabilities may be detained if they lack the capacity to govern themselves and the hospital/care home managers consider it to be in the best interests of the person with disabilities. Health professionals must make this recommendation.

POLAND

There are no special provisions in relation to decisions about health and the regime relating to incapacitation would determine the ability of a person with disabilities to make decisions.

SOUTH AFRICA

A mental health care patient may only be cared for or treated if the patient has consented to the relevant service; or it is authorised by a court order or a Review Board; or if, due to mental illness, any delay in providing care, treatment and rehabilitation services or admission may result in the death or irreversible harm. Involuntary care, treatment and rehabilitation of an individual in certain circumstances is allowed.

SPAIN

Consent to actions affecting health may be granted by a representative in the case of incapacitation or when persons with disabilities are judged unable to make a decision or to understand their situation. In the first case consent is given by the legal representative; in the second, by relatives. Incapacitated persons with disabilities may be committed to a health centre without their consent by judicial order.

POLITICAL RIGHTS

Does a person with disabilities have the right to vote, stand for elections or the ability to serve in the armed forces?

ARGENTINA

Not necessarily, for example persons with disabilities who have been declared legally incapable do not have the right to vote.

BRAZIL

If the person is judicially declared absolutely incapable of understanding the acts of civil life, he/she will have his/ her political rights suspended and won't be able to vote or to be voted for. Persons with an intellectual disability are exempted from serving in the armed forces (compulsory for men over 18), but not prohibited from joining the army if able to pass the physical and psychological tests.

ENGLAND & WALES

Yes. Person with disabilities have the right to vote, should they wish to; the MCA specifically prohibits the use of substituted decisions. Person with disabilities may also stand for elections. In the EU, it is a violation of the European Court of Human Rights to ban all people under guardianship from voting without an individualised judicial evaluation.

FRANCE

Persons with disabilities may serve in the army only if they have the medical, mental and physical abilities required and must pass the same tests as all soldiers. Person with disabilities have the right to vote, and voting apparatus must be adapted and accessible to all. Persons under curatorship or tutorship may not stand for elections.

GERMANY

The armed forces must employ severely disabled persons at a minimum of 6% of their work places. Subordinated authorities must consider severely disabled persons for every vacant position. Persons with disabilities under guardianship may not vote in or stand for national elections, in North Rhine-Westphalia and for members of the European parliament, unless the guardianship appointment was by interim order.

INDONESIA

Persons with disabilities have the right to vote and may be assisted if needed. The Public Election Committee has issued a decree providing for polling stations to be established in psychiatric hospitals and nursing homes. Patients may vote if they have a recommendation from a doctor and a psychiatrist. A person under conservatorship may also vote if s/he has reached the age of 17 or is married. Persons with disability have the right to stand for elections if a medical certificate determines that they are physically and mentally fit. Physical disabilities are not to be counted as health problems in this context.

ITALY

Yes. A person with disabilities is permitted to vote and stand for election as any such restriction of these rights would be deemed unconstitutional.

MEXICO

As set forth in the General Law of Electoral Institutions and Proceedings, people who have lost the use of their mental abilities in accordance with the Federal Civil Code will not have access to the voting polls.

POLAND

No accommodation is made for persons with disability when passing physical and psychological tests for entry into the military. Legislation determines how the disability might impact the right to enter according to military position and the level and type of disability. All persons with disabilities have the right to vote and be elected unless they have been incapacitated by the court. There is a specific provision to allow persons with disabilities to vote by proxy.

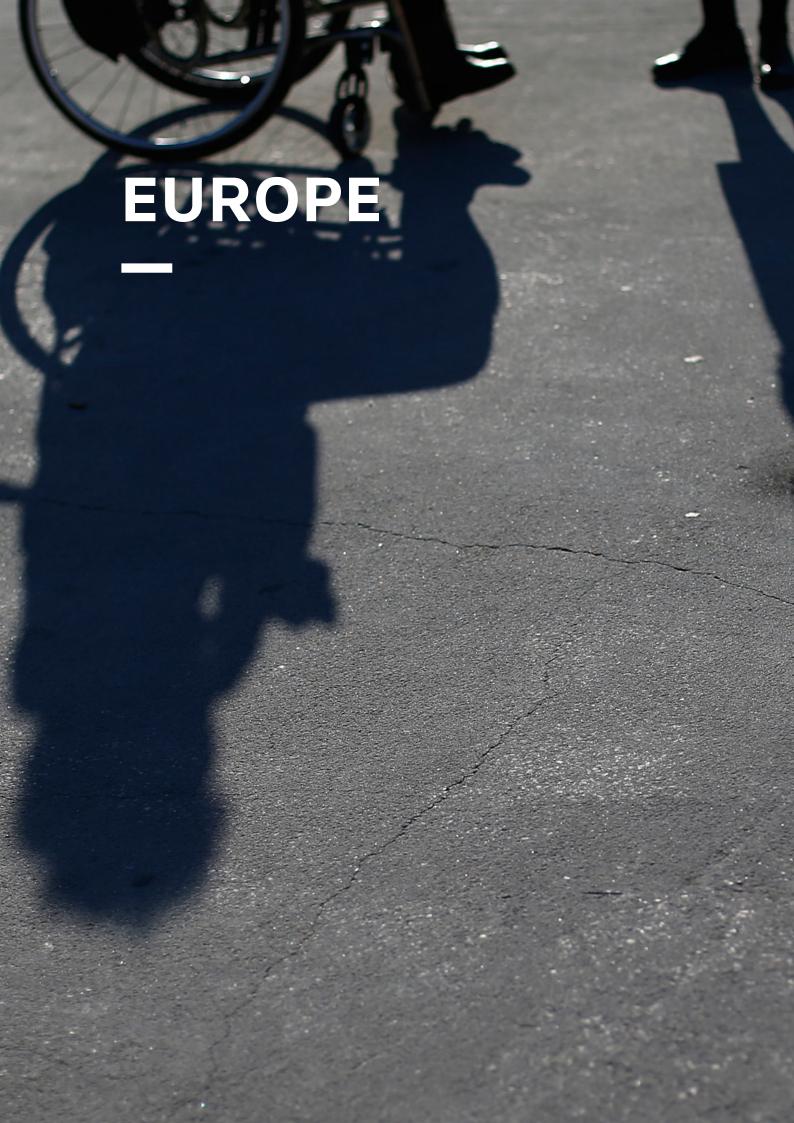
SOUTH AFRICA

A person who has been declared by a court as mentally incapacitated or who has been detained or admitted to a health care establishment in terms of the Mental Health Care Act of 2002 may not be registered as a voter and is not permitted to vote. Constitution prohibits anyone "declared to be of unsound mind" by a South African Court from being a member of the Provincial Legislature and National Assembly.

SPAIN

If a legally incapacitated person with disabilities has sufficient understanding of the decision to be taken, he has the right to vote. Only incapacitated persons with disabilities under express provision by judicial order may be prevented from voting/standing for elections.

Medical requirements may exclude persons with disability from entry into the armed forces.



ENGLAND AND WALES AND THE EUROPEAN COURT OF HUMAN RIGHTS

INTRODUCTION

Under the English law definition for a person with disabilities, a person is disabled if they have a physical or mental impairment that has a substantial and long-term negative effect on their ability to do normal daily activities. "Substantial" is to be interpreted as more than minor or trivial and "long-term" means 12 months or more. However, in the context of the Mental Capacity Act 2005 (the "MCA"), a "person with disabilities" refers to those persons who lack the capacity to make decisions for themselves due to their disability or are unable to communicate their decisions as a result of their disability (see below for further discussion on the issue of capacity).

Broadly speaking, under English law, capacity is determined on an issue-specific basis on examining a person's ability to make a particular decision at a particular time, rather than generally. This gives the courts some flexibility when considering issues of guardianship and capacity. English law, however, deviates from the provisions in the CRPD in some important respects, for example, by allowing certain types of decision-making on behalf of a person with disabilities.

IMPLEMENTATION OF ARTICLE 12 OF THE CRPD

The CRPD has been ratified in the UK. The UK has also declared the CRPD to be one of the Community treaties within the definition of the European Communities Act 1972, which means that its provisions must be given effect to and enforced accordingly. However, since the UK has not incorporated the CRPD into domestic law, individuals may not rely on it in court.

While the CRPD is not directly part of UK domestic law, it can be used as an interpretive tool in relation to the Human Rights Act 1998 (the "**HRA**"). When interpreting the HRA, courts should take into account international law as well as decisions of the European Court of Human Rights ("**ECtHR**"). The CRPD can also be used as an interpretive tool in relation to anti-discrimination and equality legislation.³ For instance, the Equality Act 2010 places a duty on public authorities to promote disability equality in everything they do (otherwise known as the equality duty), and the standards in the CRPD can help them to meet that duty.¹⁹⁶

There is, however, some legislation in the UK that is incompatible with the CRPD. For example, the UN Committee on the Rights of Persons with Disabilities has stated that systems of substituted decision-making are not compatible with Article 12 of the CRPD and should be replaced with systems of supported decision-making. The MCA allows a court to make a finding of incapacity and hand over the decision-making powers to someone else. As such, the MCA is an example of a substituted decision-making regime which is incompatible with the CRPD.

Another departure is that there is no equivalent guarantee under the MCA as in Article 12(4) of the CRPD, which provides that all measures that relate to the exercise of legal capacity shall apply for the shortest time possible and are subject to regular review. The MCA Code of Practice expressly provides that disputes should only be referred to the court as a last resort, and there is no other independent and impartial authority to resort to.⁵

LAW RELATING TO PERSONS WITH DISABILITIES

The MCA provides the main legal framework for determining when a person lacks capacity and when a person may act and make decisions on behalf of adults who lack the capacity to make particular decisions for themselves. In particular, it sets out the following statutory principles:

- a person must be assumed to have capacity unless it is established that he/she lacks capacity;
- a person must not be treated as unable to make decisions unless all practicable steps to help him/her to do so have been taken without success;
- a person is not to be treated as unable to make a decision merely because he/she makes an unwise decision;
- an act done, or decision made, under the MCA for or on behalf of a person who lacks capacity must be done, or made, in his/her best interests; and
- before the act is done, or the decision made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of that person's rights and freedom of action.

Identifying lack of capacity

The MCA assumes a person to have capacity unless it is established otherwise.⁶ In particular, a lack of capacity cannot be established merely by reference to a person's condition, or an aspect of his/her behaviour, which might lead others to make unjustified assumptions about his/her capacity. In summary, a person with disabilities would never be automatically considered as lacking the ability to exercise his/her free will just because of his/her condition. Whether or not he/she lacks capacity must be decided on the balance of probabilities, taking into account situation-specific facts.⁷

Under the MCA, a person is unable to make a decision for him/herself if he/she is unable to communicate his/her decision (whether by talking, using sign language or any other means).⁸ Therefore, if a person is completely unable to communicate their decision, in spite of any aids given to help them, they will be deemed lacking in capacity (subject to fulfilling the other conditions). The law expects persons with disabilities to be supported as far as possible to make their own decisions. This could be through providing information in a simpler way, such as using easier words or pictures, trying at different times of the day or when the person with disabilities is in better health or having a friend or an independent person to help the person with disabilities express his/her choice. Section 3(2) of the MCA explicitly recognises the need to ensure that a person has access to methods of communication appropriate to their circumstances, such as "sign language, visual aids or any other means". The MCA Code of Conduct reinforces this principle and provides examples of communicating via sign language or employing a behavioural expert to recognise alternative methods/attempts at communication.

Therefore, the law does provide for specific measures regarding facilitating communication and a person will not be assumed to lack capacity simply because they cannot communicate in a prototypical way.

Under the MCA, a person lacks capacity if he/she is unable to make a decision for him/ herself because of an impairment or a disturbance in the functioning of the mind or brain. An inability to make a decision means he/she is unable to understand the information relevant to the decision, retain information, use or weigh that information as part of the process of making the decision or communicate his/her decision.

Anyone, including for example, a health or care professional, other professional, relative or carer, might need to decide whether a person has capacity to make a particular decision. For medical decisions where consent is needed for treatment or examination, a doctor or healthcare professional will decide whether a person has capacity to consent. For legal decisions such as making a will, the solicitor concerned will decide whether a person has the capacity to make the decision.

The test for capacity under the MCA involves:

- the diagnostic test, to determine whether the person has an impairment or a disturbance in the functioning of the mind or brain; and
- the functional test, to determine whether the impairment or disturbance renders the person unable to make decisions because of an inability to understand, retain, or use and weigh the relevant information, or communicate the decision. The functional test can apply only if all practical and appropriate support to help the person make the decision has failed.⁹

The fact that a person with disabilities (including a person with disabilities who has a psycho-social disability) wants to make unwise decisions (including decisions related to his/her health that might be considered "unwise", such as refusal of treatment) is not relevant in determining mental capacity. The issue is whether he/she has the ability to make those decisions, regardless of whether they are wise or unwise. Capacity is to be assessed in relation to the particular type of decision at the time the decision needs to be made and not the person's ability to make decisions generally. Further, it is not always necessary for a person to comprehend all peripheral details for it to be deemed that they have capacity.

Section 15(1) of the MCA gives the court the power to make declarations regarding whether a person has or lacks the capacity to make a decision. There is no express mention of a duty to consult the person with disabilities, but it can be safely assumed that the over-arching principle of best interests, which covers any act done under the Act, would compel the court to consult with the person with disabilities, insofar as reasonably practicable, to determine the best interests of the person with disabilities. The principle of best interests is further explained in Section 4 of the MCA. Namely, this principle includes subsection (4), which states that: "[The person making the determination] must, so far as reasonably practicable, permit and encourage the [person with disabilities] to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him".

Appointing a lasting power of attorney

A person who thinks they may lose capacity may grant another individual guardianship by way of a lasting power of attorney, and register it with the Office of the Public Guardian. The guardianship lasts until the donor revokes it, certain circumstances (for example the incapacity of the guardian) end it, or the UK's court of protection intervenes. There are two types of lasting powers of attorney: (i) for personal welfare; and (ii) for finances. Different guardians can be appointed in respect of each and multiple guardians can be appointed for each lasting power of attorney. The guardians may have authority to act jointly or individually. Lasting powers of attorney for personal welfare can only be exercised when the donor lacks capacity in respect of a particular decision. The lasting power of attorney can include restrictions or conditions on the guardianship, and specify the guardians' replacements.

Depending on the type of lasting power of attorney granted, the holder of the power of attorney has power to make decisions about that person's health and personal welfare, and/ or property and financial affairs. Nothing in the MCA allows a guardian to take decisions such as the following on behalf of any person (including a person lacking mental capacity): consenting to marriage or civil partnership, consenting to have sexual relations, consenting to a child's adoption, discharging parental responsibilities and making a decision on voting at any election or referendum. The decision-maker has full legal protection to take actions and decisions in connection with the treatment of someone who lacks capacity, provided that all principles and sections of the MCA are complied with. It is noted that the principle of best interests, in particular, is relevant to the attorney (and deputies – see below) in carrying out their duties since this principle requires attorneys/deputies to (so far as reasonably practicable) permit and encourage the person with disabilities to participate, or to improve his/her ability to participate, as fully as possible in any act done for him/her and any decision affecting him/her.

Appointing a deputy

If a person lacking capacity has not granted a lasting power of attorney, the court may appoint a person (a deputy) to make decisions on their behalf. The powers of the court to appoint a deputy are subject to the principle of "best interests". In effect, this means that the court, in appointing a deputy, would have to, insofar as reasonably practicable, consult the person with disabilities in the process. There is no need for the person with disabilities to be consulted with regard to appointing an *attorney*, as the MCA only allows the person with disabilities to appoint an attorney, while he/she has capacity, in contemplation of a situation where the person with disabilities may lack capacity.

The powers conferred on a deputy should be limited in scope and duration as is reasonably practicable in the circumstances. A deputy can decide where that person is to live, what contact, if any, that person is to have with any specified persons, give or refuse consent to the carrying out or continuation of a treatment and give a direction that a person responsible for healthcare allow a different person to take over that responsibility.

A deputy also has powers in relation to the incapacitated person's property and business affairs. Decisions such as the following may not be made, however, on behalf of any person

(including a person lacking mental capacity): consenting to marriage or civil partnership, consenting to have sexual relations, consenting to a child's adoption, discharging parental responsibilities and making a decision on voting at any election or referendum.¹³

It is rare for the court to appoint a welfare deputy under the MCA. In particular, it would need to be shown that the absence of such a deputy would prevent services being provided or proper and conscientious care being afforded. There is limited case law on this, so it is not clear what kind of factors might be taken into account by the court when appointing a deputy, but the court has expressed concern about the powers afforded to a deputy and noted that mere convenience to a local authority was not a relevant factor to be considered.¹⁴

Challenging the actions of an attorney or deputy

An application can be made to the court of protection for the exercise of any of the powers of the court under the MCA by (among certain others) any person lacking or alleged to lack capacity, without needing permission from the Court.¹⁵

The court can also grant permission to any other person after taking various factors into account (e.g. the connection of the applicant to the person with disabilities, the reasons for the application, the benefit for the person with disabilities and alternative courses of action available).¹⁶

Based on such applications, the court can then declare the scope of the capacity of the person with disabilities and the lawfulness of anything done or yet to be done in relation to the person with disabilities.¹⁷ It may direct how the donee of a lasting power of attorney uses its authority and, if satisfied that the donee is contravening or proposes to contravene his/her authority or is not acting in the best interests of the person with disabilities, revoke the power of attorney (provided the person with disabilities does not have the capacity to do so). If it has previously appointed a deputy, it can vary or discharge the orders previously given by it.

The donor of a lasting power of attorney may revoke a lasting power of attorney at any time that he/she has capacity to do so. Given the general assumption that everyone has capacity, the donee would have the burden of showing that such a revocation was invalid.

The MCA establishes the position of "Public Guardian". The Public Guardian may direct a court of protection to appoint visitors to visit donees, deputies or persons with disabilities and report back. Visitors have various powers, including the power to interview the person with disabilities in private.

The donor of a lasting power of attorney may revoke a lasting power of attorney at any time that he/she has capacity to do so.

ENTERING INTO CONTRACTS

The MCA sets out the general principles that govern the capacity of a person with disabilities to enter into contracts. These principles are summarised below.

In determining capacity to manage an individual's property and affairs, the court looks not to whether an individual could manage affairs unaided, but whether an individual had insight and understanding of the fact that aid might be needed, and the ability to make decisions upon or give effect to advice or aid he/she may receive. Where a decision requires quite a sophisticated ability to understand and weigh the competing factors (and where, on the assessments of doctors, the person with disabilities does not have this even if he/she were given careful assistance), it is likely a guardianship/deputyship would be seen as appropriate. ²⁰

Where there is evidence to show that a person with disabilities needs guidance, supervision and support in dealing with daily living expenses and making properly informed choices on spending priorities, an intervention by way of an access to funds order might be appropriate in order to provide certainty in relation to the payment of rent and utilities by way of direct debit or standing order, and the regular purchase of food of appropriate quantity. The court is also influenced, however, by the prospect of allowing the person with disabilities to retain some level of control over a significant portion of income to spend as he/she wishes and allowing him/her the dignity of utilising whatever skills he/she has concerning his/her income. The court tends towards the less restrictive option that is consistent with the purpose of the intervention.²¹

In terms of taking out loans, guidance from the Office of Fair Trading²² states that mental capacity is always defined in relation to a specific decision at a specific time. There should be an initial assumption that a borrower has mental capacity. The onus is on the creditor to determine whether the borrower has mental capacity at the time of taking out credit. In considering credit applications, creditors need to take appropriate steps to be able to form a view as to whether or not the borrower appears to be able to understand, remember and weigh up the information and explanations, and, when having done so, make an informed borrowing decision. These include giving adequate information to the borrower and allowing sufficient time to make a decision. Where the borrower is understood or suspected to have some form of mental capacity limitation, the creditor should have proper regard to the best interest of the borrower.²³

FAMILY

Marriage and sexual relations

As outlined above in this section (see "Law relating to persons with disabilities – Identifying lack of capacity"), the general test for capacity under the MCA involves the diagnostic test and the functional test. For capacity to consent to sexual relations, the court looks at the person's understanding of the sexual nature of the act (which does not need to be complete or sophisticated). A more than rudimentary understanding of the mechanics of the sexual acts involved in both homosexual and heterosexual relations, the health risks and the

methods of avoiding and dealing with those risks is sufficient evidence of an individual's capacity to consent to sexual relations. Further, it should be noted that the court has previously held that impulsive acts or a tendency to be impulsive do not prevent a person with disabilities from weighing up or assessing the relevant information, as impulsiveness itself is considered a component in most sexual behaviour.²⁴

The court has also held, however, that, where a person with disabilities lacks capacity to consent to sexual relations, he/she also lacks capacity to consent to marriage. The capacity to consent to sexual relations forms a component of the test of capacity to consent to marriage. It is not enough for someone to understand that he/she is going through a marriage ceremony or understand its words; there must be an understanding of the nature of the marriage contract and the duties and responsibilities attached to it.²⁵

In determining the best interests of a person with disabilities, the court will follow guidance in the MCA regarding factors to take into account, including that person's wishes and the wishes of anyone involved in caring for that person.²⁶

Parental rights

A care order is given by a court and allows a local authority or authorised person to take a child into care. Under the Children Act 1989, a council can apply for a care order if it believes a child is suffering or at risk of suffering significant harm. Harm has to be something more commonplace than human failure or inadequacy, but it does not have to be intentional or deliberate. It has been held that a parent suffering from severe personality problems, multiple psychological problems and severe somatisation disorder met this threshold.²⁷

The ECtHR has further ruled on the rights of persons with disabilities who are parents. It was held that the mere fact that a child could be placed in a more beneficial environment does not on its own justify compulsory removal from the biological parents where there was no ill treatment or neglect.²⁸

Abortion

With respect to terminating a pregnancy of a person with disabilities, an application to court is not necessary where issues of capacity and best interests are beyond doubt (but an application should be made promptly where there is any doubt). For example, an application should be made where (i) there is a realistic prospect of the patient regaining capacity during or shortly after pregnancy; (ii) there is disagreement between medical professionals as to the patient's best interests; (iii) the patient, her family or the father expresses views inconsistent with termination; (iv) the procedures under the Abortion Act 1967 have not been followed; or (v) there is some other exceptional circumstance, such as the pregnancy being the patient's last chance to bear a child. The termination must be in the best interests of the patient and a legitimate and proportionate interference with her rights, but it is considered impractical and unnecessary to make an application of lawfulness to the court in each case.²⁹

DISCRIMINATION (ON GROUNDS OF DISABILITIES, INCLUDING MENTAL ILLNESS)

The primary legislation in the UK relating to disability discrimination and equality is the Equality Act 2010. Disability is a protected characteristic (i.e. discrimination that happens because of one or more of these characteristics is unlawful under the Equality Act 2010; other protected characteristics include age, race, gender, etc.) under the Equality Act 2010. The following types of discrimination are prohibited under English law:

- Direct discrimination: one person treating another less favourably than they would treat others. A person discriminates against a disabled person if: (i) they treat a person unfavourably because of something arising in consequence of that person's disability; and (ii) cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- Indirect discrimination: putting into place a provision, criterion or practice which puts a person with a disability at a disadvantage compared to people who do not have a disability. This also applies when a provision, criterion or practice is put into place which affects one group (for example, non-disabled) and not another (for example, disabled), provided that it cannot be shown that it was a proportionate means of achieving a legitimate aim.
- Harassment: protects a person who is the subject of unwanted conduct relating to their disability, which violates their dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for the individual.
- Victimisation: protects a person who is treated less favourably than others because they have made or intend to make any complaint under the Equality Act 2010 or give evidence in connection with any proceedings under the Equality Act 2010.

Where a provision, criterion or practice puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled, all reasonable steps must be taken to avoid the disadvantage. Where a physical feature puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled, all reasonable steps must be taken to avoid the disadvantage. The person or organisation providing the adjustments is not entitled to require the disabled person to pay for any of the costs of complying with the duty to make said adjustments.

Providing a service

A person providing a service to the public or a section of the public must not discriminate against a person requiring the service by not providing the person with the service. This includes providing the services on different terms, terminating the provision of the service or subjecting the person to any other detriment. As mentioned above in this section, the Equality Act 2010 requires public authorities to promote and meet their equality duty when performing their functions.

Selling/leasing property

A person selling or leasing property may not discriminate against a purchaser or a lessee by not selling or leasing said property. In this context, a person managing a property may not: (i) discriminate against a person occupying the property in any way which does not allow that person to use or benefit from that property; (ii) evict that person on discriminatory grounds; or (iii) subject that person to any other detriment.

Employment

The Equality Act 2010 provides that an employer may not discriminate or victimise when deciding to whom to offer employment, either by varying the terms on which employment is offered to a person with disabilities or by not offering employment to a person with disabilities. An employee may not be made redundant purely because he/she is a person with disabilities. Further, an employer must make reasonable adjustments to avoid persons with disabilities being put at a disadvantage compared to others in the workplace. For example, by allowing restricted hours, accessibility adjustments, providing special equipment, etc.

An employer also may not make enquiries about the health or disability of a potential employee, unless it is necessary to decide whether a task integral to the job can be carried out, to help find out if the applicant can take part in an interview, to help decide if interviewers need to make reasonable adjustments, for equality monitoring purposes or if they need to know for national security checks

Education

The responsible body of a school must not discriminate against or victimise a person:

- in the arrangements it makes for deciding who is offered admission as a pupil, the terms on which it offers to admit a pupil or by not admitting a person as a pupil; or
- by not providing, or in the way it provides, education, access to a benefit, facility or service, or by excluding the pupil from school.

The responsible body of a school has the duty to make reasonable adjustments to accommodate the needs of a person with disabilities.

A school maintained by a local authority, an independent educational institution (other than a special school) or a special school (not maintained by a local authority) has similar obligations

not to discriminate against, victimise or harass its students or a disabled person who holds or has applied for a qualification conferred by the institution. It also has a duty to make reasonable adjustments required to fulfil such duties. Universities have similar obligations.

Insurance

The Equality Act 2010 prohibits discrimination against disabled people in the provision of goods and services and this includes insurance services.

This means that it is unlawful for insurance providers to treat a disabled person less favourably because of their disability or to treat them unfavourably for reasons that arise as a consequence of their disability by refusing to provide insurance or offering insurance on worse terms.

In relation to persons with disabilities, insurance providers would have to prove that any refusal of insurance or any offer of insurance on worse terms was done:

- with reference to information which is relevant to the assessment of the risk being insured;
- that the information relied upon is from a source on which it is reasonable to rely; and
- that the refusal or higher premium is reasonable.

The type of information that might be relevant to an assessment of the risk to be insured would likely be current statistical or actuarial data, or a person's medical report. Insurance providers should not be relying upon assumptions, stereotypes or generalisations when assessing the risk of insuring disabled people and cannot adopt general, blanket policies of refusing to insure people with particular disabilities or health conditions.

Exceptions

There are, however, a number of exceptions which permit discrimination in the provision of services, the exercise of public functions or the activities of associations where the discrimination has a legitimate aim and is a proportionate means of meeting that aim. For example, in some circumstances, the fact that a person is disabled, or of a particular sex, may be used as a factor in deciding whether to provide insurance services to that person and, if so, on what terms.³⁰

The Equality Act 2010 prohibits discrimination against disabled people in the provision of goods and services and this includes insurance services.

ACCESS TO JUSTICE

As outlined above in this section, English law takes an "issue-specific" or functional approach to capacity, examining a person's ability to make a particular decision at a particular time rather than generally. As such, a person could have capacity to make some decisions for themselves but not others. In determining capacity, the courts look to the balance of probabilities and whether a person could understand information relevant to a decision with efforts to assist them in doing so. A person with disabilities would be considered to lack capacity in relation to a matter if at the material time he/she is unable to make a decision for him/herself because of an impairment of, or a disturbance in the functioning of, the mind or brain. Being 'unable to make a decision for him/herself' means that he/she cannot (1) understand or (2) retain for long enough or (3) use information relevant to the decision to make the decision or (4) that he/she cannot communicate his/her decision.³²

Relevant information includes reasonably foreseeable consequences of deciding one way or another or not making a decision in respect of the matter but, making an unwise decision does not mean that the person with disabilities does not have capacity. It should be noted that all practicable steps to help a person with disabilities make a decision must have been taken, without success, and explanations must have been given in a way appropriate to that person's circumstances (for example, simple language, visual aids, etc.) before it is established that a person does not have capacity. Therefore, a person with a mental disorder or disability does not lack capacity simply because of this disability.³³

The standard for determining whether an abuse of process would occur due to a party's diminished intellectual capacity is not whether there is a real possibility that he/she is unable effectively to participate, but whether, on the "balance of probabilities", he/she is not able to do so. There are a number of factors that the court points to that would aid a party in participating in a trial despite a mental disability, including using simple language, taking regular breaks, taking time to explain the proceedings, ensuring there is access to support, explaining the charges and possible sentences, and ensuring that cross-examination is carefully controlled. There is also a Youth Court in which judges and advocates are specially trained to deal with youths charged with criminal offences. These courts deal with youths with disabilities too.³⁴

Despite the lack of statutory authority, intermediaries can be appointed for persons with disabilities based on the court's inherent powers to ensure that steps are taken to ensure that defendants have a fair trial during both proceedings and preparation. In particular, where a defendant is found to have difficulties concentrating, instructing his/her solicitor as to his/her opinion on evidence and being cross-examined, an intermediary is appointed to ensure the defendant is afforded a fair trial.³⁵

The ECtHR has further clarified that Article 6(1) of the European Convention on Human Rights ("**ECHR**") must be interpreted as guaranteeing a person direct access to a court to seek restoration of his/her legal capacity. While the ECtHR notes that the courts should have a certain margin of appreciation in cases involving persons with disabilities (for example, they can make relevant procedural arrangements in order to secure the proper administration of justice, protect the person with disabilities or protect other litigants), such

measures should not affect the very essence of the right to a fair trial. In assessing whether a particular measure (such as excluding a person with disabilities from a hearing) is necessary, the court will take into account all relevant factors (such as the nature and complexity of the issues, what is at stake, whether the appearance of the person with disabilities represents a threat to others or to him/herself, etc.). Any limitations must be in pursuit of a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. Importantly, where the issues at stake include personal autonomy in almost all areas of the life of the person with disabilities, his/her participation in the hearing is necessary to enable him/her to present his/her own case and allow the judge to form a view about his/her mental capacity.³⁷

HEALTH

The Mental Health Act 1983 (the "MHA") covers the reception, care and treatment of people with a mental disorder, the management of their property and other legal affairs. A patient with a mental disorder may be admitted to hospital and detained if an application for admission is made by two approved mental health professionals ("AMHP") and may not be detained for more than 28 days unless a further application is made.

Guardianship

A guardianship application may be made on the grounds that: (i) the patient is suffering from a mental disorder; and (ii) it is necessary in the interests of the welfare of the patient or for the protection of others. The guardianship application must include written recommendations from two AMHPs. The person named as guardian may be either a local social services authority or any other person. A person other than a local social services authority must accept the position of guardian in writing.

The powers of a guardian are as follows:

- to require the patient to reside at a place specified by the guardian;
- to require the patient to attend at places and times specified for the purposes of medical treatment, occupation, education or training; and
- to require access to the patient to be given to any AMHP or any other person specified.

In cases of guardianship, the AMHP must consult with the nearest relative of the patient. The requirement to consult the relative does not apply, however, if it appears to the professional that in the circumstances such consultation is not reasonably practicable or would cause unreasonable delay. All the applications and orders must be decided by an independent body known as the Mental Health Review Tribunal. Parties have a right of appeal at the Upper Tribunal.³⁸

Deprivation of liberty and the MCA

The MCA establishes certain deprivation of liberty safeguards that apply to people in hospitals or care homes who have a mental disorder, who lack the capacity to give informed consent to their care and treatment, and where the hospital or care home managers consider it in the patient's best interests for them to be deprived of their liberty to receive care and treatment. The hospital or care home must apply to the local authority for authorisation to deprive liberty but, since the implementation of the MCA, there have been a very low number of such applications.³⁹

A mental disorder does not necessarily mean that a patient lacks capacity to give or refuse consent, or to take any other decision. Any assessment of an individual's capacity has to be made in relation to the particular decision being made and can vary over time. Where a patient's capacity might fluctuate in this way, consideration should be given to delaying the

decision until the patient has capacity again. If it is decided that the patient lacks capacity, sufficient steps should be taken to determine if there is a deputy to make decisions as agent and, before it is decided that admission to hospital is necessary, consideration should be given to whether there are alternative means of providing care/treatment. Patients can also express wishes in advance to apply in the case in which they are deemed no longer to have appropriate capacity in the future.⁴⁰

The MCA, however, applies subject to the MHA. In particular, this means that:

- if someone is detained under the MHA, decision-makers cannot normally rely on the MCA to give treatment for a mental disorder or make decisions about that treatment on that person's behalf;
- if someone can be treated for their mental disorder without their consent because they are detained under the MHA, healthcare staff can treat them even if it goes against an advance decision to refuse treatment; if a person is subject to guardianship, the guardian has the exclusive right to take certain decisions, including where the person is to live; and
- independent mental capacity advocates do not have to be involved in decisions about serious medical treatment or accommodation if those decisions are made under the MHA.⁴¹

The English courts have held that deprivation of the liberty of a person with disabilities for medical treatment exists where there is an objective element of a person's confinement in a limited space for a not negligible period of time, a subjective element of the person's not having validly consented to that confinement and a deprivation of liberty for which the state was responsible. It has been held that it would be undesirable to identify in advance the information that a person had to be capable of understanding and weighing in order to decide whether consent was given to deprive them of their liberty in this way. Given the complexity of evaluating capacity under the MCA, the court has held that the better course of action is for a clinician to assess the person's understanding about the situation and for the court to then (in light of the assessment and all other relevant evidence) consider whether practicable steps have been taken to help the person with disabilities decide whether or not

to give consent and whether it has been proved on a balance of probabilities that the person lacks the capacity to make such a decision.⁴²

Detention for treatment under the ECtHR

The ECtHR has also laid down criteria for the detention of people with mental illness for medical treatment. Specifically, the detention is not lawful unless (i) the person has been reliably shown to be of unsound mind; and (ii) the mental disorder is of a kind or degree which warrants compulsory confinement. Continuing confinement requires the persistence of these criteria.

On the other hand, the ECtHR has decided that, where a patient is totally incapable of making his/her own decisions, medical treatment that is regarded as a therapeutic necessity cannot be regarded as inhuman or degrading. The court needs to be satisfied, however, that the established principles of medicine are decisive in determining whether such treatment is necessary.⁴³ It has also been held that a person cannot be lawfully detained and examined as a person of unsound mind without consulting a medical expert (as this would be a violation of Article 5 of the ECHR).⁴⁴

POLITICAL RIGHTS

The UK government has reaffirmed its commitment to ensuring that persons with disabilities have the same voting rights as members of the general population. It has also been made clear, however, that the decision to vote (and how to vote) must be made by a person with disabilities him/herself (rather than by substituted decisions). The Electoral Administration Act 2006 abolished archaic common law provisions that denied voting rights to people on the grounds of intellectual or mental state and the MCA expressly prohibits the use of substituted decisions with respect to voting.⁴⁵

The Mental Health (Discrimination) Act 2013 repealed and amended certain sections of the Mental Health Act 1983 that could prevent people with mental health conditions from serving as members of parliament, members of the devolved legislatures, jurors or company directors. The Mental Health (Discrimination) Act 2013 aims to reduce the stigma and negative perceptions associated with mental illness. The ECtHR has also explicitly held that it is a violation of the ECHR to ban all people under guardianship from voting without an individualised judicial evaluation.⁴⁶

The Mental Health (Discrimination) Act 2013 aims to reduce the stigma and negative perceptions associated with mental illness.

FRANCE

INTRODUCTION

Under French law, persons with disabilities are persons who are not able to provide for themselves because of a medically certified alteration of mental or physical attributes which is likely to prevent the expression of their will. 47

It is important to note that there is no specific definition of a person with disabilities and an adequate level of protection will be decided by the courts on a case-by-case basis based on a prior medical assessment.

IMPLEMENTATION OF ARTICLE 12 OF THE CRPD

France ratified the CRPD on 18 February 2010. A report⁴⁸ issued by the French Senate further confirmed that no changes to French domestic legislation were necessary to implement Article 12 of the CRPD, given that the reforms made in 2007 already reflected the main principles set out in the **CRPD**.

LAW RELATING TO PERSONS WITH DISABILITIES

French law⁴⁹ states that, every citizen is to be protected, even though he/she may not be able to defend his/her own interests. French law provides for a catalogue of "basic" rights for citizens which constitutes a change of paradigm since the previous legislation only meant to protect the protected persons' patrimonial rights. Such basic rights include that legal protection measures (as discussed further below) may only be implemented with a view to respecting the protected person's

- (i) freedom and fundamental rights;⁵⁰
- (ii) dignity, integrity and privacy; and
- (iii) right to have personal relationships with third parties.⁵¹

Reforms in 2007 to the French Civil Code created the modern legal framework for managing the affairs of people with mental disorders and intellectual disabilities in France. This provides for three different types of protection procedures ("**Protection Procedures**"):

- judicial safeguard caretaking with full capacity;⁵²
- curatorship partial guardianship; and
- 🍳 tutorship full guardianship.

Identifying lack of capacity

Every person is assumed to have capacity. Disability by itself does not mean a lack of capacity. Lack of capacity can only be identified by way of a judicial request. The following

people may submit a request to the judge for a Protection Procedure to be applied: (i) a person with disabilities; (ii) his/her spouse, civil partner or cohabitee; (iii) a relative; (iv) a person who has a close and stable relationship with the person with disabilities; (v) a person who is already named as the representative of the person with disabilities or their curator or tutor; (vi) the public prosecutor;53 or (vii) the doctor of the person with disabilities. It is important to note that only those doctors listed by the public prosecutor and the guardianship judge are entitled to identify lack of capacity and advise which Protection Procedure may be implemented.

Appointment of a guardian

For a Protection Procedure to be implemented, a person must not be able to provide for him/herself or for his/her own interests because of a medically certified alteration of his/her mental or physical attributes which is likely to prevent the expression of his/her will.⁵⁴ Only doctors listed by the public prosecutor may certify such alteration.⁵⁵ Additionally, the following requirements must be met for a Protection Procedure to be implemented:

- judicial safeguard may be ordered by a judge if a person requires "temporary legal protection or needs to be represented for certain acts" (such as where a person's mental or physical capacities are temporarily reduced, following an accident for example);⁵⁶
- curatorship may be ordered by a judge for a person who "without being unable to act for him/herself, needs to be continuously advised or supervised for certain important civil acts";⁵⁷ and
- tutorship may be ordered by a judge for "persons who must be represented continuously for every act of civil life" (this mainly applies to persons who are unable to act on their own such as persons with severe mental disabilities due to a mental disease or old age).⁵⁸

Procedure for appointment of a guardian

The following people may submit a request for a Protection Procedure to the judge: (i) a person with disabilities; (ii) his/her spouse, civil partner or cohabitee; (iii) a relative; (iv) a person who has a close and stable relationship with the person with disabilities; (v) a person who is already named as the representative of the person with disabilities or their curator or tutor; (vi) the public prosecutor;⁵⁹ or (vii) the doctor of the person with disabilities.⁶⁰

The person with disabilities is entitled to express his/her opinion at the hearing by the guardianship judge unless the judge believes, based on a medical opinion, that the hearing would cause harm to the person with disabilities or if that person is unable to express his/her will. The person with disabilities may be accompanied to the hearing by a lawyer or, if permitted by the judge, any other person of his/her choice.⁶¹ Further, the person with disabilities is entitled to choose a guardian, except in cases of judicial safeguard where a special representative need not be appointed. If one is required, then such representative will be appointed by the judge. In relation to curatorship and tutorship, the person with disabilities may designate his/her own curator/tutor, in which case the judge must accept his/her choice unless the potential curator/tutor refuses, is unable to fulfil the position or where it would be against the interests of the person with disabilities. In such cases, the judge will appoint someone from a legal list of persons starting with the spouse.⁶²

Role of the guardian

The current legal framework provides for a large degree of flexibility in relation to the different Protection Procedures. As a general principle, a Protection Procedure must be "proportionate and individualised according to the degree of alteration of the personal abilities of the person concerned".⁶³

In relation to judicial safeguard, the principle is that the person with disabilities retains their rights. 64 If necessary, however, the judge may appoint a special representative on behalf of the person with disabilities for certain acts. The consent of such representative will then be required for those selective acts. 65

In relation to curatorship, the person with disabilities also retains his/her rights but the curator's consent will be required for certain acts which would require the authorisation of the family council or guardianship judge (for example, for a sale of assets). ⁶⁶ In certain circumstances, the judge may specify a list of transactions which will require consent. ⁶⁷ In some circumstances, the judge may also order a more restrictive form of curatorship where the curator will receive the entire income of the person with disabilities in a special bank account opened in the name of the person with disabilities. In such cases, the curator will also be required to deal with all payments to third parties (for instance, in the case where the person under curatorship has put their assets in jeopardy while taking authorised actions and tutorship would be a disproportionate measure). ⁶⁸

In relation to tutorship, the principle is that the person concerned is represented in all acts of civil life by their tutor⁶⁹ but the judge may also list certain acts that the person with disabilities may accomplish alone or with the assistance of a tutor.⁷⁰

Supervision of guardianship

The guardianship judge and the public prosecutor are responsible for exercising a supervisory role over all Protection Procedures within their geographic jurisdiction. Persons named as a representative, curator or tutor are required to appear before the guardianship judge and the public prosecutor in order to provide any information they request.⁷¹

Duration

The legal term for judicial safeguard is one year and this is renewable once.⁷² Tutorship and curatorship have a term of five years, and are renewable every five years.⁷³

Challenging the appointment of a guardian

A person with disabilities, his/her spouse, partner in a civil partnership (unless they have stopped living together) or a parent⁷⁴ may challenge the decision of a guardianship judge regarding the tutorship/curatorship and bring an appeal to the High Court within 15 days.⁷⁵

ENTERING INTO CONTRACTS

General⁷⁶

The law⁷⁷ sets out three categories of contracts:

"Conservatory Contracts"

means contracts with the purpose of protecting the estate of a person with disabilities or preserving any assets from an immediate threat or inevitable depreciation without compromising any prerogative of the owner, for example, repairs threatening the stability of a building.

"Administration Contracts"

means contracts with the purpose of enhancing the estate of a person with disabilities, for example, opening a bank account or a savings account, requesting a debit card, receipt of income, receipt of capital gains, use of monies which are not capital revenues or supplementary income and loans and indebtedness for low amounts. There is no monetary threshold; the amounts are assessed on a case-by-case basis.

"Disposal Contracts"

means contracts which affect the estate of a person with disabilities, in the present or in the future, by substantially modifying its content, substantially diminishing its value in capital or affecting the prerogative of the owner. Examples include selling a building, liquidating assets generally, modifying the terms of an existing bank account or savings account, administration of a bank account including the use of any payment method if the person with disabilities is prohibited from issuing cheques, use of capital revenues and supplementary income, closing a bank account, requesting a credit card and loans and indebtedness for substantial amounts.

The following rules apply for persons with disabilities to enter into a contract:

Judicial Safeguard - a person with disabilities under judicial safeguard is not prevented from entering into any contract and may subsequently take legal action to rescind the contract or reduce it in case of an excess in value.

Curatorship - as discussed above in this section, a person with disabilities under the curatorship regime may enter into certain legal transactions but the guardianship judge may order the assistance of a curator for other legal transactions. In particular, the person with disabilities may enter into contracts which would not have any significant adverse effect on his/her estate; for example, contracts of small value ("Administration Contracts") or contracts that preserve the estate of the person with disabilities ("Conservatory Contracts"). Contracts which may have a significant impact, such as those affecting the income or estate of the person with disabilities ("Disposal Contracts") may not be entered into without the curator's approval. A curator may request a judge for authorisation to act, if the curator believes that the person with disabilities will seriously compromise his/her interests by entering into a contract. The assistance of a curator will be required for contracts involving the use of capital gains⁷⁸, donations⁷⁹, and matrimonial contracts.⁸⁰

Tutorship - a person with disabilities under tutorship has no capacity to enter into any contracts and has to be represented in all contracts (except for day-to-day transactions of low value). The tutor may act alone on behalf of the person with disabilities in relation to Administration Contracts and Protective Contracts but has less discretion in relation to Disposal Contracts, which will require the authorisation of the judge or the family council. The judge may, however, list certain contracts which do not require the authorisation of the tutor. A person with disabilities under tutorship may also be authorised to draft and/or revoke their will.

FAMILY

Marriage of adults in curatorship and tutorship⁸¹

An adult under curatorship may only get married with the prior consent of the curator. If the curator's consent cannot be obtained, the judge must authorise the marriage. An adult under tutorship may only get married with the prior authorisation of the judge or the family council and provided that the person under tutorship consents. Case law suggests that the consent to marriage of a person under tutorship no longer requires a mere lucid interval but that there should not be any doubt as to the consent of the person with disabilities. It must be ascertained that the person with disabilities understands the implication of such commitment in the long term and that such consent is the result of his/her free will.⁸² The judge or the family council, as the case may be, will hear the future spouse's opinion, the parents' opinion and the opinion of persons who have close ties with the person with disabilities.

Note that a family council is established by the judge if it is necessary to ensure effective protection of the person with disabilities or his/her estate and when the composition of his/her family permits it. The judge designates a minimum of four members of the family council taking into account the preferences of the person with disabilities. The family council will be responsible for appointing a tutor and the head of the family council. The head of the family council will be responsible for conveying the agenda of each meeting to the guardianship judge. The head and the tutor must, however, be different people.

Civil partnership of a person in judicial safeguard and curatorship/tutorship

There are no specific provisions concerning the entry into a civil partnership for adults under judicial safeguard but the provisions of the Civil Code⁸³ on civil partnership will apply. Given that the general rules on contracts are applicable to civil partnership agreements, however, provisions of a civil partnership agreement which are deemed contrary to the interests of the person under judicial safeguard will be considered invalid.⁸⁴

A person under curatorship may not sign a civil partnership agreement without obtaining the approval of the curator.⁸⁵ No approval will be required for making a joint declaration⁸⁶ at the trial court or before a notary⁸⁷ or in case of modification of a civil partnership agreement.

A person under tutorship may not sign a civil partnership agreement without obtaining the

approval of the judge or the family council. The judge will hear the future partners, parents and any persons with close ties to the person with disabilities. The person with disabilities will be assisted by the tutor when signing the civil partnership agreement.⁸⁸

Divorce of adults under curatorship and tutorship

Divorce proceedings of a person with disabilities under curatorship may be initiated with the assistance of the curator,⁸⁹ while the divorce proceedings for a person with disabilities under tutorship may only be initiated by the tutor with the authorisation of the family council, if there is one, and after medical advice has been provided, and if possible after the hearing of the person with disabilities by the family council or the judge.⁹⁰

In cases where the tutorship/curatorship had been entrusted to the spouse of the person with disabilities, an ad hoc tutor/curator must be appointed for purposes of the divorce proceedings.⁹¹

Forced abortions

Forced abortions are prohibited under French law. The penalties incurred for this crime are five years' imprisonment and a €75,000 fine.⁹² Consequently, an abortion may not be imposed on a person with disabilities who has not consented to an abortion (except where she is unable to consent and her state necessitates a therapeutic intervention).

If an abortion is considered medically necessary and the person with disabilities is not able to express consent, an abortion may be justified. Such medical necessity may arise where the pregnancy endangers the woman's health or if there is a high probability that the child will be born with a disease that is recognised as incurable at the time of diagnosis. The necessity is determined by doctors and a multi-disciplinary team.⁹³

Sterilisation

The basic rule is that the sterilisation of a person with disabilities under tutorship/curatorship for contraceptive purposes will only be permitted if there is an absolute medical objection to the use of other contraceptive measures, or when it is impossible to implement other contraceptive measures.

The guardianship judge will decide based on hearing the person with disabilities (and, if the person with disabilities is able to express his/her will, obtain her/his consent), the parents of the person with disabilities or his/her legal representative. The judge will also be required to consult with an expert committee that will assess the medical justification for sterilisation. A sterilisation cannot be carried out if the person with disabilities has clearly expressed a refusal or revoked his/her consent.⁹⁴

Adoption

The French Civil Code contains specific provisions for the adoption of (i) an adult under curatorship/tutorship; and (ii) the child of an adult under curatorship/tutorship. A person

under judicial safeguard may consent freely to the adoption of his/her child.⁹⁵ Subject to specific statutory provisions, actions which imply a strictly personal right can only be taken by the person with disabilities him/herself, even if the person with disabilities lacks the ability to express his/her consent, but never by a representative. This has been widely criticised under French law, in particular with respect to cases where an adoption could not take place because the person with disabilities could not consent but the court had no regard to individual circumstances and followed the law pursuant to which an adoption may not take place.⁹⁶

Actions deemed to be strictly personal are (i) the declaration of a child's birth; (ii) the official recognition of a child; (iii) actions in connection with the exercise of parental authority concerning a child; (iv) the declaration of the choice of name or change of name of a child; and, in particular, (v) the consent to one's own adoption or the adoption of a child.⁹⁷

Taking children of persons in tutorship/curatorship into care

The general principle is that the consent of the person under tutorship/curatorship must be obtained before his/her children can be taken into care, as this is considered a strictly personal right.⁹⁸

Exceptions

A person who is not in a position to express his/her own will, may be prevented from exercising parental authority.⁹⁹

If both parents have been deprived of parental authority or there is no other parent alive, the children will be placed under tutorship and will be subject to the legislation applicable to the Youth Welfare Office. ¹⁰⁰ In such case, the judge will either designate a person to temporarily take care of the children or place the children under the local authority social services. ¹⁰¹ In the meantime, tutorship for the minor will be organised.

The person designated by the judge will form a family council which will in turn choose a tutor who can be a family member or a family friend. The children will live with their tutor. If there is no tutor available, the children will either live in foster care or in a specialised centre of social aid for children.

Inheritance

In relation to a person with disabilities under tutorship, only the tutor may accept the inheritance on behalf of the person with disabilities. The inheritance may be up to the net assets of the estate of the person with disabilities; if in excess, the tutor must obtain the approval of the judge or the family council.¹⁰²

There are no specific provisions for inheritance by a person with disabilities under curatorship, but a person with disabilities may accept an inheritance up to the net assets of the estate without obtaining consent/assistance of a curator and in other cases with the consent of the curator.

It is advisable for parents to take specific measures while they are alive to protect vulnerable members of the family. The following measures may be taken:

- intervivos distribution to the surviving spouse so that the surviving spouse can continue having the financial means of caring for the person with disabilities¹⁰³
- distribution of the estate among the heirs by gift while they are still alive or by will 104 ;
- drafting of a will with a bequest in favour of the person with disabilities providing for the designation of a new beneficiary of the bequeathed property after the person with disabilities has deceased¹⁰⁵;
- providing in the will that the person with disabilities will have the usufruct of the estate and that the other heirs will have the bare ownership; and
- setting up a trust in favour of the person with disabilities.

At least 6% of the employees of the French state, the regional and local authorities and their public entities (except for those performing industrial and commercial activities) which employ more than 20 people must be persons with disabilities.

DISCRIMINATION (ON GROUNDS OF DISABILITIES, INCLUDING MENTAL ILLNESS)

Employment

At least 6% of the employees of the French state, the regional and local authorities and their public entities (except for those performing industrial and commercial activities) which employ more than 20 people must be persons with disabilities. The same obligation applies to businesses and companies which employ more than 20 employees.¹⁰⁷ During the application process for employment in public administrations or in the private sector, it is prohibited to discriminate against a person because of his/her disability (except if a doctor has pointed out an incompatibility between the disability of the applicant and the job he/she is applying for).¹⁰⁸ There is no specific procedure in case of dismissal on grounds of disability. If the dismissal is the result of discrimination, however, the person with disabilities can sue his/her employer.¹⁰⁹

To ensure compliance with the principle of equality for employees with disabilities, employers must take the following measures: (i) employ persons with disabilities corresponding to their qualifications; (ii) facilitate progress within the company; and (iii) offer training tailored to the needs of a person with disabilities, in each case, provided that the expenses resulting from such measures are not disproportionate. These obligations also apply to the private sector. The overarching principle of ensuring that persons with disabilities are granted access to employment is subject to the disabilities not being incompatible with the respective employment. Therefore, in certain circumstances, it may be necessary for an employer to require certain physical attributes/abilities for the performance of certain jobs (for example, sports teacher).

Government institutions

French law has implemented a fund for integrating and training persons with disabilities within the Civil Service. The fund also ensures financing and professional training for persons with disabilities seeking employment. The fund receives its financial contributions from public institutions that do not comply with their statutory obligation to employ persons with disabilities (see above under "Employment" in this section). The financial contributions are calculated based on the public institutions' annual declaration. If such declaration reveals non-compliance, the financial contributions will be 'mandatorily enforced' by the relevant public account.

The Ministry of Defence has published guidelines¹¹⁴ which focus on changing common bias with respect to persons with disabilities. This document provides advice on how to welcome persons with disabilities and how to behave with a person with disabilities to create a friendly and productive atmosphere. These guidelines are not mandatory but are published to raise the awareness of employees in the administration with respect to the issue of persons with disabilities.

State-funded schools

In France, the public education service must provide schooling for persons with disabilities (regardless of their age). A multi-disciplinary team is responsible for assessing the skills and needs of children, teenagers and adults with disabilities to ensure that their schooling/training is tailored to their needs. Teachers/professors working in schools/universities must receive special training to be able to take care of students with disabilities.¹¹⁵

Disability must also be included in the university's strategy to foster equal opportunities for persons with disabilities.¹¹⁶ The law provides for four goals:

- consolidation of arrangements and development of support for students with disabilities throughout their academic training towards their professional integration;
- development of human resources policies with regard to persons with disabilities;
- increase of consistency and transparency of training and research programmes in the field of disability; and
- development of accessibility of the services provided by universities.

In France, institutions of higher education (including universities and other colleges) are obliged to enrol and register students with disabilities, provide them with special training and make any adjustments to the infrastructure of the school that may be required to facilitate access by persons with disabilities.¹¹⁷ The Education Code clearly states that no extra tuition is needed to implement these adjustments.¹¹⁸ In certain circumstances, a student with disabilities may be granted special conditions for taking exams, for example, additional time and/or assistance by a third party.¹¹⁹ This depends on a doctor's opinion where the doctor is appointed by the Commission for Rights and Autonomy of person with disabilities. The doctor's opinion will be based on the student's medical and academic information. After receiving the doctor's opinion, the academic authorities that organise the exams will decide whether the student should be granted special conditions for the purpose of taking exams.

ACCESS TO JUSTICE

A person under curatorship may bring an action before court without the assistance of the curator unless (i) the action concerns the person's patrimonial rights,¹²⁰ i.e. property rights; or (ii) the judge has expressly prohibited the person with disabilities from initiating proceedings on his/her own.¹²¹

A person under tutorship is represented by his/her tutor. If an action concerns extrapatrimonial rights, the tutor can only act after having obtained the authorisation from the judge or family council.¹²²

In civil proceedings, a person under tutorship may be represented in court by his/her tutor¹²³ and a person under curatorship is assisted by his/her curator.¹²⁴ Criminal proceedings may not be brought against a person under curatorship/tutorship without the curator/tutor being notified of the proceedings.¹²⁵ A person with disabilities may not be considered

criminally liable if he/she was not able to understand the nature of his/her acts. In certain circumstances, where a person with disabilities may be considered criminally liable, liability may be mitigated if it can be shown that the person with disabilities in question did not fully comprehend the nature of his/her acts.

HEALTH

French law provides for general principles that govern the will of patients, including that:

- any person may make his/her own decisions with respect to his/her health, while taking into account the opinion, information and recommendations of a qualified healthcare practitioner;
- no medical act or treatment shall be performed without the free and informed consent
 of the person concerned. Such consent may be withdrawn at any time. If the person is
 under tutorship, the doctor has to respect tutorship proceedings. If the person is not
 under a Protection Procedure, the doctor still has to form his/her own opinion about the
 person's ability to consent;
- if the person concerned cannot express his/her own will, no medical act/treatment may be carried out (except in cases of emergency) without consulting a third party of confidence or the family; and
- if a person under tutorship or curatorship is capable of expressing his/her own will, such consent must be sought.¹²⁶

With regards to persons under judicial safeguard, the Civil Code and the Public Health Code do not provide for any restriction. Hence, the general regime applies and they are deemed to be able to make a decision concerning their health.

With regards to persons under curatorship or tutorship, the Civil Code provides that they are usually able to make a decision concerning their health on their own. The judge can limit this right, however, based on the person's state of health. This decision can be made by the judge upon or after the opening of the curatorship/tutorship procedure. To help the person under curatorship or tutorship to express his/her consent, the judge can ask a third person to assist the person with disabilities in his/her decision-making. If the judge considers that the person is not able to give a clear consent, he/she can ask either the curator or the tutor to make a decision in place of the person with disabilities.

In any case, the tutor or the curator may not (without the authorisation of the judge or family council) make a decision which can cause physical harm or interfere with the private life of the person with disabilities. The tutor or the curator is, however, entitled to take measures which are strictly necessary to stop any danger caused by the behaviour of the person concerned. If such measures are taken, the judge or family council must be notified.¹²⁷ This procedure is only applicable to health decisions.

Psychiatric treatment

The person affected or his/her legal representative must consent to receiving psychiatric treatment. ¹²⁸ In certain cases, psychiatric treatment may be ordered by the director of a healthcare facility without that person's consent, provided that (i) his/her mental disorders make consent impossible; or (ii) his/her mental health requires emergency treatment. ¹²⁹ The director will decide whether the person affected should receive psychiatric treatment based on (i) the request of a family member/person close to the patient/tutor/curator; or (ii) if no request has been made by a third party, evidence in the form of a medical certificate showing that such person faces significant risks for his/her own health.

If a person with mental disorders has not given his/her consent to psychiatric treatment, the restrictions to his/her individual freedom must be adapted as may be necessary and proportionate to his/her health. That person's dignity must in any case be preserved in all circumstances. If it is decided that a person shall receive treatment, such person must be informed and allowed to invoke their rights.¹³⁰

Access to health

The National Agency has issued recommendations which are addressed to all social and medico-social establishments that take care of persons with disabilities. The aim of these recommendations is to foster the development of practices within social and medico-social establishments to facilitate easier access to health and adequate patient care for persons with disabilities.¹³¹

POLITICAL RIGHTS

Ability to serve in the armed forces

A person who wishes to serve in the armed forces must pass a medical test. The doctor will have to verify that the applicant has the necessary medical, mental¹³² and physical abilities required for army service. Consequently, persons with disabilities who do not pass the medical examination may not serve in the army.¹³³

Right to vote and to stand for election

Every person with disabilities has the right to vote.¹³⁴ Voting machines must be manufactured so as to enable persons with disabilities to vote autonomously irrespective of the severity of their disability.¹³⁵ Generally, all polling offices and polling equipment must be accessible to persons with disabilities (including those with mental disabilities).¹³⁶

In France, persons under curatorship or tutorship may not be elected to public office.¹³⁷ A person under judicial safeguard may be elected.¹³⁸

GERMANY

INTRODUCTION

Under German law, it is assumed that all persons have legal capacity, although persons of full age who, by reason of mental illness or physical, mental or psychological disability cannot in whole or in part take care of their matters, may require the appointment of a guardian.

IMPLEMENTATION OF ARTICLE 12 OF THE CRPD

In accordance with Article 12 of the CRPD, in Germany each person is considered to have legal capacity (*Rechtsfähigkeit*) and the capacity to act (*Handlungsfähigkeit*). Since 1992, a person with disabilities may not be considered legally incapacitated (*entmündigt*) due to his/her disability.

LAW RELATING TO PERSONS WITH DISABILITIES

The main principles of German law with regard to persons with mental disabilities are the following;

- a person must be assumed to have legal capacity disability, by itself, does not mean that a disabled person lacks legal capacity;
- lack of legal capacity will always be linked with that person's inability to manage his/her own matters in whole or in part; and
- each person is always a subject of law and a bearer of rights and obligations regardless of that person's disability; only the capacity to enforce and execute his/her rights on his/ her own may be limited; if the latter is the case, a guardian is appointed to take care of that person's matters to the extent necessary.¹³⁹

Legal capacity

Every adult under German civil law is presumed to have full legal capacity. Persons who are of full age but who cannot, by reason of a mental illness or physical, mental or psychological disability, in whole or in part take care of his/her matters are the exception.

If a person with disabilities is in a permanent state of pathological mental disturbance, which prevents the exercise of free will, that person will be considered incapable of contracting on his/her own.¹⁴⁰ A declaration of intent by such person will be void¹⁴¹ and a declaration of intent vis-a-vis this person will only become effective after being received by a legal representative. The law aims to prevent a declaration of intent becoming effective if the person to whom it is addressed is not fully capable of comprehending the legal significance of such declaration of intent.¹⁴²

Lack of legal capacity does not mean that persons with disabilities do not have the same rights as those with full legal capacity. A person's right may be enforced by a guardian who will represent the person with disabilities in all matters that the person with disabilities cannot take care of on their own, including entering into contracts. As discussed further below, the appointment of a legal guardian will not preclude a person with disabilities from entering into contracts, unless there is a reservation of consent (*Einwilligungsvorbehalt*). The person with disabilities will always be able to enter into day-to-day low-value transactions without the guardian's consent.

Legal guardianship

If a person of full age, by reason of mental illness or physical, mental or psychological disability, cannot in whole or in part take care of his/her matters, the guardianship court (*Betreuungsgericht*), on the demand of that person or *ex officio*, can appoint a legal guardian¹⁴³ subject to the following requirements:

- the appointment must not be against the free will of the person of full age;¹⁴⁴ and
- the guardian may only be appointed for certain tasks in relation to which guardianship is necessary.¹⁴⁵

German guardianship law aims to avoid an interference with the rights and the free will of the person concerned and to allow the guardianship only to the extent necessary. This restriction on guardianship is a constitutional matter because of the constitutional protection of each person's free will.

The wishes of the person with disabilities must be considered when choosing a guardian. The guardian suggested by the person with disabilities must be appointed, unless this would be against the best interests of the person with disabilities. ¹⁴⁶ If no guardian is suggested, family and other personal contacts must be considered, in particular parents, children, spouses and civil partners. ¹⁴⁷

The guardian has a comprehensive statutory power of representation and can represent the person with disabilities in and outside of court. If the guardian acts outside his/her scope of functions and as an unauthorised agent, any legal act will be considered invalid, unless the person with disabilities approves such act.¹⁴⁸

Reservation of consent

The guardianship court can, in circumstances where a person is under guardianship, order that the guardian's consent be obtained for all declarations of intent by a person with disabilities if it is necessary to prevent a substantial danger to the person with disabilities or his/her property. The reservation of consent may not, however, extend to declarations of intent relating to the following areas:

- entering into marriage/civil partnership;
- testamentary dispositions/dispositions;
- in other cases where consent is not needed according to the provisions of German family and inheritance law; and
- the declaration of intent merely confers a legal advantage for the benefit of the person under legal guardianship or day-to-day low-value transactions.

Guardianship authorities

The German Law on the Exercise of Official Tasks in Legal Guardianship of Adults (*Betreuungsbehördengesetz*) provides a framework for the territorial jurisdiction and general tasks of competent authorities. Such tasks include, in particular, assistance and advice for persons under guardianship and for guardians. Additionally, the competent authorities shall ensure sufficient training of guardians.

ENTERING INTO CONTRACTS

Legal capacity¹⁵⁸

A person of full age who lacks legal capacity can enter into contracts with the assistance of a legal guardian. The guardian has a comprehensive statutory power of representation and can represent the person with disabilities in and outside of court. This includes the power to enter into contracts on behalf of the person with disabilities (see the sections on "Legal guardianship" and "Reservation of consent" above).

If a person of full age, who lacks capacity to contract, enters into low-value day-to-day transactions (for example, cash transactions), those transactions will be considered effective with regard to performance and, if agreed, consideration, as soon as performance and consideration have been rendered (without the involvement of the guardian). Whether a transaction is of "low value" will depend on the general average price and income level regardless of the economic circumstances of the person with disabilities.¹⁵⁹

The purpose of the law is to improve the legal position of legally incapacitated adults and to support their "social emancipation". Mentally disabled people should be given the opportunity to participate in business transactions to a limited extent without giving up the protection granted by the legal system. The following activities are examples of what may be considered day-to-day business transactions: purchasing food, beverages, cosmetic products, as well as the use of elementary services, such as, public transport.

FAMILY

Marriage, civil/registered partnership

Every person has the constitutional right to enter into marriage¹⁶⁰ provided that the person concerned has the required capacity to enter into marriage.¹⁶¹ Capacity depends on the person with disabilities understanding the nature of marriage; consequently, the person with disabilities in question needs to freely decide in this respect - no guardian can be appointed in this respect and no court can take the decision for the person with disabilities. Intellectual abilities are not necessarily decisive, so that persons with severe mental disabilities may be considered as understanding the nature of marriage and be able to form a free will. Courts will always examine each case individually and consider if the mental disability of the person with disabilities extends to the ability to understand the nature of marriage; but, the court will only decide if the person with disabilities is able to form a free will in this respect and if the decision of the person with disabilities to enter into marriage is based on that free will or not. It is important to note that a legal guardian would never be able to consent to marriage on behalf of a person with disabilities, as the right to marriage is an inherently personal right.¹⁶²

Inheritance

Persons with disabilities have full capacity to inherit. As regards the capacity to dispense the inheritance, see the sections on "Legal capacity" and "Legal guardianship" above. In cases where the person with disabilities is not able to take care of and dispense the inheritance on his/her own, a guardian will be appointed to do this on behalf of the person with disabilities. Pursuant to German law, social welfare is generally suspended or reduced if the person in need has sufficient income or property to maintain him/herself. As a result, a person with disabilities benefiting from social welfare and an inheritance will have his/her social welfare benefits reduced/suspended. The amount of such reduction/suspension will depend on the amount of the inheritance. The court, therefore, provides for a possibility for the person with disabilities to keep his/her social welfare benefits as well as the inheritance by the testator drawing up the will by nominating a "first heir" (Vorerbe), who will be only a preliminary "limited" heir and a second "subsequent" heir (Nacherbe) who becomes an heir upon the death of the first heir or any other event as named in the will (for example marriage of the first heir). As a result of this succession of the second heir, the first heir is restricted from disposing of the inheritance freely. Social welfare authorities are also unable to access the inheritance if it would result in reducing the inheritance of the second heir.¹⁶³

The German constitution provides that no person shall be discriminated against with regard to their physical or mental disability. This constitutional right aims to actively integrate mentally disabled people into society.

Testamentary capacity

German civil law assumes that every person has full testamentary capacity and therefore only regulates exemptions where a person is incapable of drawing up a will.

A person who is incapable of understanding the importance of a declaration of intent made by him/her and of acting in accordance with this understanding due to a pathological mental disturbance, mental deficiency or derangement of the senses is not capable of drawing up a will.¹⁶⁴

The requirement for testamentary capacity is intended to protect the person making the will from dispositions with regard to his/her property in case he/she is not capable of understanding the consequences of his/her declarations of intent.

The relevant date for ascertaining testamentary capacity is the date of the drawing up of the will. If the will is drawn up at a time when a person lacks testamentary capacity, it will be invalid even if the person drawing up the will obtains the required testamentary capacity at a later stage. In the latter case, the person with testamentary capacity can confirm the previously invalid will by undersigning it.

Sterilisation

A person with disabilities has the right to request sterilisation. As sterilisation poses a serious interference with the rights and the physical integrity of the person with disabilities, certain requirements have to be met.¹⁶⁵

In situations, where the person with disabilities concerned is under guardianship, the guardian may consent to a sterilisation on behalf of the person with disabilities, only if:

- the sterilisation is consistent with the intention of the person under guardianship;
- the person with disabilities will indefinitely remain incapable of consenting;
- there is a likelihood of pregnancy without the sterilisation;
- as a consequence of the pregnancy, a risk to life or danger of severe impairment of the physical or mental health of the pregnant person can be expected, and it cannot be averted by reasonable means; and
- a pregnancy cannot be averted by any other reasonable means.

In any case, the approval of the guardianship court must be obtained for sterilisation. In making a decision, the guardianship court will consider whether there are any other alternatives which would allow restoring fertility in the future. The guardianship court will only approve based on the opinion of medical experts in relation to the requirements listed above in this section. In making the decision, the medical experts are required to consult and examine the person with disabilities in question.

DISCRIMINATION (ON GROUNDS OF DISABILITIES, INCLUDING MENTAL ILLNESS)

General

The German constitution provides that no person shall be discriminated against with regard to their physical or mental disability. This constitutional right aims to actively integrate mentally disabled people into society. Generally, constitutional law binds public authorities and not individuals. According to the German Constitutional Court (Bundesverfassungsgericht), however, this constitutional right may also influence the legal relationship between individuals.

Employment

Private and public employers with an average of at least 20 work places must employ severely disabled persons for at least 5% of their work places. Employers with less than 40 work places must employ one severely disabled person and employers with less than 60 work places monthly¹⁶⁸ must employ two severely disabled persons.¹⁶⁹

An employer who fails to employ the mandatory number of severely disabled persons will be liable to pay a compensatory charge but the payment does not repeal the duty to employ severely disabled persons. The compensatory charge will amount to a monthly payment of:

- EUR 105 per unfilled work place if the employer employs less than 5% but more than 3% severely disabled persons;
- EUR 180 per unfilled work place if the employer employs less than 3% but more than 2% severely disabled persons; and
- EUR 260 per unfilled work place if the employer employs less than 2% severely disabled persons.¹⁷⁰

Employers with less than 40/60 work places must pay EUR 105/180 monthly, if they fail to employ the mandatory number of severely disabled persons.¹⁷¹

Hiring severely disabled persons

No person shall be discriminated against in Germany because of their disability.¹⁷² This protection applies to employees in particular.¹⁷³ If an employee experiences any kind of less favourable treatment by an employer, it will be considered discrimination.¹⁷⁴ If the employer violates its obligations and discriminates against an employee due to their disability, the employee being discriminated against will be entitled to receive compensation.¹⁷⁵ To claim such compensation, the employee being discriminated against will only be required to provide indications (for example, the disabled person needs to prove only that another comparably skilled person with no disability received a certain treatment (such as being

invited for a job interview) while the disabled person was treated differently) for his/her alleged discrimination. It will then be assumed, by law, that the reason for such different treatment was the employer's discrimination against the disabled person. The employer, in turn, will be required to prove that he/she has not discriminated against the employee concerned.¹⁷⁶

Exception

Discrimination is permitted only in very limited circumstances. One such circumstance is where the actual work involved and the professional demands do not allow for the participation of a disabled person in that position.¹⁷⁷

Severely disabled employees have a right to employment where they can use and develop their skills and know-how to the best of their ability. They are also entitled to disability-friendly infrastructure and maintenance of the workplace, with particular attention to the risk of accidents. This includes operating facilities, machinery and equipment as well as the design of the (i) workplace; (ii) working environment; (iii) organisation of work; and (iv) working time. For the purposes of complying with these obligations, the employer will receive support from the federal labour office and the integration offices considering the essential characteristics of the severely disabled employees. The employer does not have to comply with the aforementioned, if this would require disproportionate efforts.

Employment – unfair dismissal

Severely disabled employees may only be dismissed (whether in an ordinary dismissal or in a dismissal for cause) with the prior consent of the competent authority (Integrationsamt).¹⁸⁰ A dismissal without such consent is invalid. Such protection for dismissal, however, applies only to employment contracts which have been in existence for at least six consecutive months at the time the notice of dismissal is delivered.¹⁸¹

A "severely disabled person" for purposes of the statutory protection against unfair dismissal is "a person with an impaired function due to an abnormal physical, mental or psychological condition resulting in a 50% reduction in such person's ability to participate in social life and to work". Persons with a 30% incapacitation are equivalent to severely disabled persons, if their impairment would otherwise prevent them from obtaining or maintaining a suitable job. The competent authority will grant its consent, if another comparable, suitable and reasonable position has been secured for the dismissed severely disabled person. 183

It is the existing employer's duty to offer such position since otherwise the competent authority will simply refuse its consent to dismiss the disabled employee. The existing employer will, however, be in compliance with this duty if it presents another employer offering such suitable and reasonable position. As long as the existing employer can prove to the competent state authority that the disabled employee will not be without employment, the authority's consent will be given. In case of dismissal for good cause, the application for the competent authority's consent must be submitted within two weeks of the employer becoming aware of the grounds for dismissal. The competent authority must then render

a decision within two weeks of receipt of such application; otherwise, its consent will be deemed to have been granted.¹⁸⁴

In relation to dismissal based on questions asked by an employer which relate to disability, an employer may ask an employee questions about his/her person only if the employer has a justified reason for doing so, i.e. the employer's reason must be so important that it would warrant such an infringement of that person's right of privacy. Questions which are discriminatory are not allowed. Consequently, questions directed at disabilities are not allowed, in particular prior to the commencement of an employment. An exception to this rule is where an employer asks questions about disability during the employment. In such case, the disabled employee must answer this question truthfully and will not be allowed to rely on the provisions providing for special protection against unfair dismissal in favour of severely disabled persons. Consequently, a severely disabled employee who is dismissed for answering untruthfully may be dismissed like any other employee.¹⁸⁵

ACCESS TO JUSTICE

Ability to approach judicial authorities (excluding criminal courts)

A person's legal capacity will determine whether such person can be party to an administrative court and civil court proceedings. Consequently, since every person is presumed to have legal capacity under German law, every person is presumed to be capable of being a party to an administrative and civil court proceeding irrespective of any mental or physical disability. The principle is that a person has the capacity to sue and be sued if that person is legally competent. The capability to sue and be sued may, however, be restricted on a case-by-case basis if (i) the individual is under guardianship; and (ii) the case relates to an area that falls within that guardian's responsibility.

Civil and criminal responsibility

Under German law, a person has to be criminally liable to be convicted in criminal court. However, a person who, in a state of pathological mental disturbance, inflicts damage on another person is not responsible for such damage under the German law of torts. The requirements for this protection are most likely to be satisfied in cases of severe mental disability. In cases of mild mental handicaps, it will depend on the individual case whether that individual may enjoy this protection. This protection also applies in relation to liability under German contract law. 188

A person with mental disabilities is not criminally liable for his/her acts if, at the time of such acts and due to his/her intellectual disability, he/she was incapable of (i) appreciating the unlawfulness of his/her actions; or (ii) acting in accordance with any such appreciation due to a pathological mental disorder, profound consciousness disorder, debility or any other serious mental abnormality. The court will release such person from criminal liability only if these conditions are met and also base its decision on the opinion of an expert who will examine

the mental condition of the accused. 189

If the above requirements are not fully satisfied, but a person's ability to (i) appreciate the unlawfulness of his/her actions; or (ii) act in accordance with any such appreciation has been significantly reduced due to a pathological mental disorder, a profound consciousness disorder, debility or any other serious mental abnormality, such person will be held criminally liable and can be convicted but the courts will have discretion to mitigate the sentence/punishment.¹⁹⁰

If a person with intellectual disabilities commits a criminal act but cannot be held criminally liable because the above requirements are met or the sentence is mitigated, the court may order the hospitalisation of the accused in a psychiatric hospital. ¹⁹¹ The accused, however, may only be hospitalised if, on the basis of an assessment of all relevant circumstances, there is a likelihood that the accused will commit a significant illegal act in the future due to his/her intellectual disability and, therefore, presents a danger to the public.

Court proceedings may not commence if the accused cannot be held criminally liable or if the accused lacks the mental ability to stand trial. An accused is unable to stand trial if he/she cannot reasonably represent his/her interests in and out of court, defend him/herself in a comprehensible manner, and issue and accept procedure statements. Therefore, a person with intellectual disabilities will be, depending on the severity of his/her disability, unlikely to be able to stand trial. In such case, the public prosecutor will not bring an action¹⁹² and the court will, therefore, not be able to initiate proceedings. The public prosecutor may, however, apply for hospitalisation for the purposes of public safety.¹⁹³

If the accused can be convicted, the court may sentence the accused to imprisonment and order hospitalisation. In such cases, hospitalisation usually takes place prior to imprisonment¹⁹⁴ and the time spent in psychiatric hospital will be counted towards the period of imprisonment.

HEALTH

Guardianship court¹⁹⁵

In situations where there is a significant risk that the person under guardianship may die or sustain long-lasting harm as a result of certain medical treatment, the approval of the guardianship court will need to be obtained prior to the guardian consenting to such medical treatment (for example, such approval is required when amputating a leg). If the approval of the guardianship court is not obtained, the person under guardianship may be given such treatment only if waiting for the approval would put the patient into significant danger.

The approval of the guardianship court will also be required in cases where the guardian has refused to consent to medical treatment which is medically necessary and there is a justified risk that the person under guardianship will die or suffer serious, long-lasting harm if that person does not receive such medical treatment. The guardianship court will

always be bound by an existing will of the person under guardianship. The court's approval will, however, not be required if both the guardian and the doctor agree that the proposed treatment or its omission is in line with the will of the person under guardianship.

POLITICAL RIGHTS

Right to vote/right to stand for elections

Persons with disabilities under guardianship may not participate and vote in the elections to the German Bundestag unless the appointment of the guardian was made by an interim order only. This topic is currently being critically considered. It is argued that the relevant law directly contradicts Article 29 of the CRPD. This prohibition also applies to local elections in North Rhine-Westphalia¹⁹⁷ and to participating in the elections for the German members of the European Parliament if a guardian has been appointed. The service of the elections and the elections for the German members of the European Parliament if a guardian has been appointed.

Ability to serve in the armed forces

The armed forces must employ severely disabled persons for a minimum of 6% of their work places. Additionally, the subordinated authorities of the Ministry of Defence, such as the territorial administration of defence (territorial Wehrverwaltung), have to consider severely disabled persons for every position to be filled. The application procedure can be less stringent to ensure severely disabled people get a chance to secure employment, for example, some positions may require only a minimum of physical suitability or, if a formal selection process is required, the disabled person will be admitted automatically. Generally, it is fair to say that the disabled person will be assessed very favourably.

ITALY

INTRODUCTION

The first major definition of persons with disabilities under an Italian law²⁰⁰ which recognises specific rights for employees with disabilities, defines handicapped persons as persons who manifest a stable or progressive physical, psychological or sensory disability which causes difficulties in relationships, learning, working integration and which results in social disadvantage and/or in a situation of isolation. This definition may be used as a guide for the interpretation of other Italian legislation which deals with persons with disabilities.

IMPLEMENTATION OF ARTICLE 12 OF THE CRPD

The CRPD has been ratified by Italy. At the same time, a National Observatory was created to promote the enforcement of the CRPD by different means.²⁰¹A Biannual Action Plan of this National Observatory²⁰² in 2013 concluded that Italy must work towards more social inclusion and independence for persons with disabilities. It suggests that this can be achieved by training for professionals and by a reform of the Italian Civil Code in order to completely replace the concepts of incapacity and limited legal capacity with that of trusteeship for persons with disabilities. No action has been taken yet to implement these proposals, although a system of trusteeship is in use (see below).

LAW RELATING TO PERSONS WITH DISABILITIES

Framework

Italian law provides a general framework for the protection of persons with disabilities.²⁰³ This enshrines general principles to be followed by legislators and public authorities. They include the protection of the dignity, freedom and independence of persons with disabilities, integration into society, elimination of obstacles to the development of persons with disabilities and access to services, healthcare, justice and financial protection.

General provisions for the protection of persons with disabilities deal with the assessment of disabilities, prevention/diagnosis/care of persons with disabilities and design of a legal framework for support of persons with disabilities in education, medical treatment, employment, access to public premises and services, information rights and tax benefits.

Provisions for the compulsory employment of persons with physical disabilities have been extended to persons with mental disabilities.

Legal incapacity regime/Limited legal capacity regime²⁰⁴

Under the Italian Civil Code, persons in a condition of permanent/continuing serious mental disability and who are not in possession of their faculties can be declared legally

incapacitated where considered strictly necessary for their protection. According to the most recent case law, legal incapacity is to be considered a means of last resort, to be applied only when the less restrictive regimes of limited legal capacity or legal trusteeship are not appropriate due to factual circumstances relating to the beneficiary of such regimes. Judicial actions to declare legal incapacity can be started by the person with disabilities, his/her relatives, guardian or by the public prosecutor. The subject of the order must be interviewed by the judge, and actions for a declaration of legal incapacity may result in the application of the less restrictive regimes of limited legal capacity or legal trusteeship.

Under the limited legal capacity regime, a person with disabilities may have the right to carry out certain ordinary administrative acts without the assistance of a guardian. If the mental disability which led to a declaration of incapacity ceases to exist, the regime can be revoked or a less restrictive regime applied. Application must be made by a relative or guardian of the person with disabilities or by the public prosecutor. In any case, a special protective custody judge must monitor the situation and inform the public prosecutor of any changes/improvements in the condition of the person with disabilities.

Trusteeship regime²⁰⁵

A trusteeship regime was introduced in 2004 as an alternative to the more invasive legal capacity regimes described above in this section. The regime provides for persons with disabilities who are not capable of taking care of their own monetary or non-monetary interests to be assisted by a trustee, appointed by the relevant protective custody judge.

The trustee is chosen taking into account the opinion of the person with disabilities and interests. If the person with disabilities does not express a preference, the judge can choose a trustee, preferably from a pool of close relatives.

The decree appointing the trustee must also provide for the duration, scope and any limitations on the appointment. Actions falling outside the decree can be performed freely by the person with disabilities. The person with disabilities is also entitled to be informed of the trustee's decisions and to file a claim with the protective custody judge in case of disagreement.

The trusteeship regime is the least invasive regime available under Italian law. According to the majority of cases decided under Italian law,²⁰⁶ it should be considered as the first option in capacity/support applications for a person with disabilities.

ENTERING INTO CONTRACTS

Mandate agreements

Under Italian law, principal/agent agreements terminate where either the principal or the agent is declared legally incapacitated or subject to the limited legal capacity regime. ²⁰⁷ Exceptionally, an agreement granting an agent a right to run a commercial business on behalf of a principal does not terminate in these circumstances unless the parties expressly withdraw from such agreement.

Annulment of contracts

Italian law provides for the annulment of contracts or unilateral deeds entered into by a person with disabilities who has not been declared legally incapacitated by a judge but who was not in possession of his/her faculties at the time the deed/contract was entered into and was, therefore, incapacitated as a matter of fact.²⁰⁸ Case law sets out some practical guidance on how capacity and bad faith are to be ascertained.²⁰⁹

The test for the annulment of contracts is different from the one to be carried out with respect to unilateral deeds, as the former will lead to the annulment of a contract only if the bad faith of the other contracting party can be proved.

Rental agreements

Italian law provides for rental agreements to automatically terminate where a tenant is declared legally incapacitated or made subject to the limited legal capacity regime, unless a guarantee is provided in favour of the landlord.²¹⁰

Bank accounts

Italian law allows a party to a banking contract to withdraw from the agreement if the other party is declared legally incapacitated or made subject to the limited capacity regime.²¹¹

FAMILY

Under Italian law, persons with disabilities have equal rights with respect to family life. 212

Inheritance/Making a will²¹³

Persons with disabilities can inherit property, even if they have been declared incapacitated or of limited capacity. The relevant guardian or trustee must accept the inheritance in front of a notary or court clerk. To protect the person with disabilities, guardians/trustees cannot be heirs of a person with disabilities, unless appointed before they became guardians/trustees or unless they are family members.

It is possible to appoint an executor to oversee the execution of a will which benefits a person with disabilities or to assign assets to an institution/association on condition that they use these to benefit the person with disabilities. Persons with disabilities who have been declared legally incapacitated cannot make a will. Case law indicates that a lack of capacity must be total and absolute.²¹⁴ In this case, the assets of a person with disabilities pass under statutory rules to near relatives. Persons with disabilities subject to a trusteeship regime can, however, make wills, with the assistance of the trustee, if necessary.

Wills made by persons with disabilities who were not subject to any kind of guardianship or trusteeship regime at the time the will was made can be subsequently annulled by the court in certain circumstances to protect the person with disabilities.

Adoption

Persons with disabilities have priority in adoption procedures in order to promote their social integration. Adoption by unmarried persons is allowed for persons with disabilities.²¹⁵ Case law has shown that families with a disabled child are not to be considered incapable of adopting another child purely because of the disability of their existing child.²¹⁶

Marriage/sexual relationships

Persons with disabilities who have been declared legally incapacitated cannot enter into marriage, although persons with disabilities subject to the limited legal capacity and trusteeship regimes can.²¹⁷

A case brought by a trustee seeking the divorce of a person with disabilities distinguished between actions involving property and those involving personal rights. Actions involving personal rights will always be subject to an evaluation of the actual or implied will of the person with disabilities.²¹⁸

Persons engaging in sexual relationships with persons with disabilities can never claim that the person with disabilities has consented to such relationships if a medical evaluation finds that the person with disabilities is psychically unfit to make decisions of this kind.²¹⁹

DISCRIMINATION (ON GROUNDS OF DISABILITIES, INCLUDING MENTAL ILLNESS)

General

Persons with disabilities who are discriminated against can use a specific fast-track civil trial procedure intended to provide quicker and more effective relief. In such allegations of discrimination, the burden of proof is reversed (i.e. the defendant must prove he/she did not discriminate against the person with disabilities).²²⁰ Associations and NGOs dealing with the protection of rights for persons with disabilities are permitted to initiate claims on behalf of the person with disabilities.²²¹

Employment²²²

The right to work of persons with disabilities is protected by law and applies to those with mental as well as physical disabilities. Certain mandatory provisions apply to public and private employees, including the right not to be dismissed because of one's disabilities, compulsory employment of persons with disabilities in businesses having more than 15 employees and protections for persons with disabilities.²²³

As above, persons with disabilities who are discriminated against can benefit from specific fast-track civil trial procedures. Trade unions, as well as associations and NGOs supporting persons with disabilities, are permitted to initiate employment claims on behalf of a person with disabilities.

Public and private employers are obliged by law to adopt any reasonable accommodating measures to achieve full equal treatment between persons with disabilities and other workers.

Differences of treatment can be justified if required by the nature of the work or workplace and in such case will not be considered discrimination against persons with disabilities.

Dismissals from employment because of serious adverse health conditions may be found to be unfair under employment law, as well as discriminatory.²²⁴

Insurance

Under the Italian Insurance Code, insurance companies operating in Italy may be subject to claims, fines and reputational damage if they do not take all measures to comply with the CRPD, including eliminating clauses from their policies which discriminate against persons with disabilities.

ACCESS TO JUSTICE

Ability to approach judicial authorities

Persons with disabilities who have been declared legally incapacitated cannot begin proceedings.

However, persons with disabilities under the limited capacity or trusteeship regimes can initiate proceedings with the assistance of the relevant guardian/trustee.²²⁵

Certain NGOs are entitled by law to begin proceedings on behalf of persons with disabilities in order to enforce anti-discrimination provisions in Italian law.²²⁶

The office of Ombudsman exists for the supervision of local authorities generally. Persons with disabilities and associations supporting persons with disabilities can choose to file a complaint with the Ombudsman. The Ombudsman must then act as mediator between the claimant and the local authority. If the claimant is not satisfied with the outcome, he/she is free to pursue a remedy through the appropriate tribunals.²²⁷

Ability to challenge appointments of guardians²²⁸

Italian courts can remove guardians from office for a number of reasons, including negligence, abuse of powers, ineptitude, unworthiness to hold office and insolvency. A case ruling provides that persons with disabilities found to have limited capacity are not to be considered unable to express their feelings about their environment.²²⁹ The judge cannot remove the guardian without having given him/her a chance to be heard, although in urgent cases the guardian can be temporarily suspended from office.

HEALTH

Cessation of treatment

In a case brought to request termination of treatment for a person with disabilities in a permanent vegetative state, the court found that persons with disabilities who have been declared incapacitated must be guaranteed medical treatment. Interruption of such treatment will only be permitted by the court if the factual evidence shows that this is in line with the wishes of the person with disabilities or there is scientific evidence that the condition is irreversible.²³⁰

Denial of treatment

A case concerning permission to appoint a trustee in relation to future medical treatment in case of the applicant's incapacity at such future time found that a trustee could be validly appointed to convey the wishes of the person with disabilities.²³¹

Abortion²³²

Abortions can be requested where there is danger to a woman's mental health or where a woman has disabilities, especially if intellectual in nature. Persons with disabilities who have been declared legally incapacitated may apply for abortion. The consent of the court is needed. If the application is made by the woman's spouse or guardian, the person with disabilities must confirm her willingness to abort.

POLITICAL RIGHTS

Right to vote/stand for election

Under Italian law, there is no restriction on the right of a person with disabilities to vote²³³ or stand for election.²³⁴ A court ruling of 1987 found that any limitation on the right of a person with disabilities to vote would be in breach of the Italian Constitution.²³⁵

A campaign in 2013 sought to promote the participation by persons with disabilities in public life by asking political parties to make their political programmes more easily accessible to persons with disabilities. 236

POLAND

INTRODUCTION

As a general rule, persons with disabilities are persons whose physical, psychological or mental condition permanently or temporarily hinders, limits or prevents everyday life, learning, work and the fulfilment of social roles.²³⁷ Whether a person would be considered as a person with an intellectual/profound disability for the purposes of relevant Polish law or regulation is determined on a case-by-case basis, by authorised medical authorities and courts.

IMPLEMENTATION OF ARTICLE 12 OF THE CRPD

The CRPD has been ratified in Poland,²³⁸ but Poland has made one interpretation to the CRPD and two reservations which affect the implementation of Article 12 of the CRPD in Poland.

In a statement on the binding nature of the CRPD the government of Poland said²³⁹ that it interprets Article 12 in a manner permitting the use of incapacitation in the circumstances and in the manner prescribed by national law, as a means referred to in Article 12 paragraph 4, when as a result of mental illness, mental retardation or other mental disorders a person is not able to control their conduct.

The government of Poland has also made reservations regarding the rights under Article 23 of the CRPD of all persons with disabilities of marriageable age to marry and found a family and to say that Article 23 should not be interpreted as providing an individual right to abortion. This reservation is made with respect to the current provisions of Polish law according to which a person who is fully incapacitated or a person suffering from mental retardation or disorder may not enter into marriage. However, if the physical and mental health of a person suffering from mental retardation or disorder does not constitute a threat to marriage and health of future offspring and that person is not fully incapacitated, a court may allow such person to marry. With respect to abortion Polish law generally provides for very limited reasons for a legally admissible abortion. Hence the reservation in this respect.

LAW RELATING TO PERSONS WITH DISABILITIES

The Polish Civil Code (the "**Polish Code**") provides the main legal framework for acting and making decisions on behalf of adults who lack the capacity to make particular decisions for themselves. The Polish Code provides two categories of incapacitation, namely: full incapacitation and partial incapacitation. A person who has attained the age of 13 years – and normally by law has limited capacity - may be fully incapacitated, if, as a result of mental illness, mental retardation or other types of mental disorders, he/she is not able to "control their conduct". The type of mental affliction that a person may suffer from is not relevant in establishing whether they can control their conduct. A person who has attained the age of majority (18 years) may be partially incapacitated due to mental illness, mental retardation or another kind of mental disorder, if that person's state does not justify full incapacitation, yet he/she requires assistance in managing his/her affairs.

The results of full incapacitation are serious as the person may not enter into any contracts and is deemed not to have any legal capacity at all. Any act of legal significance carried out by a person who has been fully incapacitated shall be deemed to be null and void, other than where they concern small issues of daily life (such as buying a bottle of water, some basic food stuff or a ticket for public transportation), except where the act involves something to the detriment of the person who has been incapacitated.

Even if a person who has been incapacitated regains his/her mental faculties, the incapacitation continues until set aside by the court. The court shall set aside a ruling on legal incapacity where the reasons for such incapacitation cease to exist. A petition to set aside legal incapacity may be filed by a representative of the incapacitated person as well as by the incapacitated person him/herself. Such ruling may also be issued by a court acting *ex officio*.

Identifying lack of capacity

A petition for legal incapacitation may be filed with the court by the spouse of the person whose legal incapacitation is petitioned, the person's lineal relatives and siblings, or his/her legal representative. If a person has a legal representative, his/her relatives may not file a petition for his/her incapacitation.

Whether a person is able to control his/her conduct is decided by the court. A court decides about incapacity and its scope (full or partial) by taking into account the overall life and family situation of the relevant person.

The decision to determine legal incapacitation of an individual may only be taken by a panel of three professional judges acting jointly, after consideration of two independent opinions of medical experts issued upon examination of such individual. There is firstly an evidentiary hearing to determine the state of health and the personal, professional and material status of the person whose legal incapacitation is petitioned for, the type of affairs that are handled by such person and the way such person provides for his/her needs. The person whose legal incapacitation is petitioned for must also be examined by an expert psychiatrist or neurologist and by a psychologist.

Guardianship

Once a judgment of full incapacitation is given, it is served on the court of protection which appoints a guardian. The guardian of a legally incapacitated person shall be first of all his/her spouse or, if there is none, his/her father or mother.

If there is no spouse or parent or the court considers appointing them to be against the best interest of the incapacitated person, the court appoints one of the other blood relatives of or other persons close to the incapacitated person or his/her parents (if it is not against the best interest of the incapacitated person). If there are no such persons, the court of protection turns to the social care organisational unit to suggest a possible guardian.

A guardian takes care of the person and property of the ward. He/she is supervised by the court of protection. A guardian shall request the consent of the court of protection in all important matters concerning the person or property of a ward. A guardian's competences do not extend to the family life of the ward since an incapacitated person cannot enter into marriage and is deprived of parental authority.

The court of protection supervises the exercise of guardianship by regularly checking the guardian and providing him/her with guidelines and recommendations. The court of protection may request the guardian provide explanations concerning any matters falling within the scope of guardianship, and present documents associated with its exercise. Moreover, a guardian shall, within the time limits determined by the court of protection, no less than once a year, submit reports to the court concerning the ward and accounts of the administration of his/her property.

Custody

A custodian is appointed in the case of partial incapacitation. If the court considers it necessary, the custody extends to the right to represent the partially incapacitated person and administer his/her property. The provisions on guardianship, as indicated above in this section, apply accordingly to custody.

A custodian may also be appointed in case of a disabled person (who is not incapacitated) if that person needs help in all matters or in certain types of matters or a specific matter. The scope of the custodian's rights and obligations is determined by the court. A disabled person (who is not incapacitated) has the full right to decide about his/her own life; thus, the custody is terminated at the request of the disabled person for whom it was established.

ENTERING INTO CONTRACTS

In determining whether a person with disabilities has the capacity to enter into contracts, under Polish law, one would only have to determine whether the relevant person has been incapacitated and to what extent (partial or full incapacitation). If a court has not declared such person incapacitated, he/she will continue to have the same rights as any other person, even if he/she is has a mental or other profound disability.

Apart from the system of guardianship and custody, Polish law provides a certain degree of protection also to persons who have not been incapacitated. For example, under Polish law, a declaration of intent (such as an offer) is invalid if it was made by a person who for whatever reason was in a state which excludes conscious or free decision-making and the expression of his/her intent. In particular, it concerns a mental illness, mental retardation or other, even temporary, mental disorder. This regime is broader and applies to persons who have not been incapacitated and applies where a person concludes a contract when his/her mental illness strengthens (even temporarily) to a degree that prevents that person from proper recognition of his/her actions.

Under Polish law, there is no need for specific guidance in relation to the taking of loans/ operating of bank accounts, etc., since the principles discussed above apply in these situations as well.

FAMILY

Marriage and sexual relations

While it is clear that a person who has been incapacitated may not enter into marriage, under Polish law, even other persons affected by mental illness or retardation may not enter into marriage. They may marry only if a court determines that their mental condition would not pose a threat to the marriage or the health of any future children and consents to them entering into a marriage.²⁴⁰

Parental rights

Persons with disabilities may adopt children, unless they have been fully incapacitated.²⁴¹

If parents lose parental authority over their minor child, notwithstanding the reason for loss (i.e. also loss due to incapacitation), the child is subject to the procedure for appointment of a guardian. Thus, the guardian of a parent, if he/she is not at the same time the appointed guardian of a child, has no rights over the child.

Abortion

As mentioned above, Poland has made a reservation to the CRPD such that it does not imply the right to have an abortion under Polish law for persons with disabilities, whether incapacitated or not.

DISCRIMINATION (ON GROUNDS OF DISABILITIES, INCLUDING MENTAL ILLNESS)

Under the Polish Constitution, all persons have the right to non-discrimination. Further, under Polish law, persons with disabilities have the right to "independent, active and free of discrimination" living. ²⁴² This legislation includes a set of ten rights which indicate the most crucial areas where intensive measures are required. Among those areas are:

- access to goods and services that enable full participation in society;
- access to treatment and care, early diagnosis, therapeutic rehabilitation and education, as well as health benefits;
- access to comprehensive rehabilitation measures aimed at social adaptation;
- learning at schools together with their non-disabled peers, as well as the use of special education or individual education;
- psychological, educational and other special assistance enabling development; and
- work in the open labour market in accordance with a person's qualifications, education and opportunities.

Even persons who have been incapacitated have these rights, but are represented by their guardians.

If a public authority denies a person with disabilities any of these rights, such person has recourse under the law against the public authority. The type of recourse would depend on the type of violation suffered.

Special care

The Polish Constitution also requires public authorities to provide special care for persons with disabilities. If a public authority does not provide a special (as opposed to standard) standard of care, then persons with disabilities may have recourse against such public authority in law.

Services

Non-discrimination policy restrains both public and private entities from adopting measures which may be considered discriminatory. Thus, in everyday life, it is prohibited to differentiate between people on the basis of their disability.

Employment

Although persons with disabilities have the right to employment, persons who have been incapacitated may not enter into contracts of employment.

Polish employment law establishes that employers must not discriminate against persons with disabilities, and a violation of this principle of equal treatment may result in the employer having to compensate the person with disabilities in an amount at least equal to the amount of the statutory minimum wage.²⁴³

This legislation also contains the principal rules for classifying different degrees of disability and specific obligations of the employers. Apart from the obligation to treat employees equally irrespective of disability, this includes adapting the workplace to the needs of employees with disabilities. In addition, there are financial incentives in place to promote employers hiring persons with disabilities.

Education

As mentioned above in this section, all persons with disabilities have the right under Polish law to study at schools together with their non-disabled peers, as well as the use of special education or individual education. Further, there is specific legislation guaranteeing the rights of persons with disabilities to unlimited and equal access to education.²⁴⁴ It also contemplates the possibility of students with disabilities receiving additional support under certain target state programmes.

Educational institutions, like other public institutions, are obliged to make reasonable adjustments for persons with disabilities.

In addition, there is specific legislation providing for persons with disabilities to have the right to unlimited access to sports activities. The law also encourages local authorities to organise sport activities for persons with disabilities.²⁴⁵

All persons notwithstanding their disability have an equal right to vote and to be elected unless they are incapacitated by a court's decision.

POLITICAL RIGHTS

Right to vote/stand for election

All persons not with standing their disability have an equal right to vote and to be elected unless they are incapacitated by a court's decision. Therefore, theoretically, even though a person may have an intellectual, psycho-social or other disability, they have the right to vote, and stand for elections.²⁴⁶

In addition, presumably to help those persons with disabilities who are not incapacitated by a court's decision, but are not able to vote in person, the law provides for the right of persons with disabilities to vote by proxy.

Ability to serve in the armed forces

Special provisions govern the rights of persons with disabilities to serve in the military. While each candidate must pass the physical agility and psychological test with no accommodation being made for their disability, the legislation determines how their disability might impact their right to join the military and it depends on the position in the military and the level and type of disability concerned.

SPAIN

INTRODUCTION

The Spanish law definition of a person with disabilities reproduces the definition given in the CRPD: persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.²⁴⁷

The overarching theme in Spanish law is that "no one can be declared incapacitated but by a judicial judgment and due to one of the causes foreseen by law". The causes foreseen by law are persistent physical or mental diseases or deficiencies that prevent a person from governing him/herself. It should be noted, however, that Spanish legislation establishes a model of substitution of the incapacitated person's will in the decision-making process, instead of a supportive model as the CRPD foresees.

IMPLEMENTATION OF ARTICLE 12 OF THE CRPD

The CRPD was ratified by Spain in 2007. This means that, under the Spanish Constitution, the CRPD is deemed to form part of Spanish legislation, even though Spain has not fully incorporated the CRPD into domestic law. As a result, the complete effectiveness of the rights granted by the CRPD is not guaranteed and the old regime for assessing and dealing with legal incapacity continues to apply. Nevertheless, many of the rights granted by the CRPD are available.

Many Spanish legal commentators and independent bodies²⁴⁸ consider that the existing Spanish guardianship systems should be replaced by a system that respects the autonomy, will and preferences of the incapacitated person.

The Spanish Supreme Court has considered this matter in certain cases and ruled that the current system of guardianship is compatible with the CRPD, as long as it is construed in accordance with certain principles.²⁴⁹

The Spanish Government has appointed a commission to draft proposed new articles of the Civil Code. The reform is intended, among other things, to fill the gaps in the current regime for persons with disabilities, due to the need to adapt the current regulations to Article 12 of the CRPD.

LAW RELATING TO PERSONS WITH DISABILITIES

General provisions

Spanish law defines persons with disabilities using the definition in the CRPD and provides that they are entitled to exercise their rights in accordance with their individual autonomy and should be supported to make their own choices.²⁵⁰

Incapacitation proceedings

Under Spanish law, a person can only be declared incapacitated by a judge and due to one of the causes set out in the law. The causes foreseen by law are persistent physical or mental diseases or deficiencies that prevent a person from governing him/herself.²⁵¹

It should be noted that, although the legal list is a numerus clausus, the essential thing to consider the existence of one of these causes is the concurrence of two determining circumstances: (i) the inability of a person to govern him/herself and (ii) the persistence of the causes leading to the incapacity.²⁵²

In consequence, the term "person with disabilities" refers to all persons with disabilities in general, including persons with physical, mental, intellectual or sensory disabilities and not just psycho-social, intellectual or profound disabilities.

In fact, the judicial declaration of incapacity may be sought by the concerned person with disabilities him/herself. The law recognises the active legitimate interest of the person with disabilities to seek a judicial declaration of their own disability and to appear in the process in their own defence and representation.

The law establishes that certain evidence is mandatory in the incapacitation proceedings, such as a hearing of the closest relatives of the person with disabilities and an examination of the person concerned. This is a judicial recognition of the incapacitated person as an individual. The judge will make a personal assessment of the status of the concerned person, interviewing him/her without any specific formalism.

This examination is an essential condition that applies not only to the First Instance Judge but also to the Court of Appeal if an appeal is formulated.

Failure to comply with this obligation will invalidate the actions taken and, therefore, the incapacitation proceedings, since the examination constitutes the recognition of constitutional precepts referring to the fundamental right to personal development.²⁵³

The judge must examine the relevant person with disabilities, but is not obliged to take such person's preferences into account, as the decision should be based exclusively on medical criteria.

The judgment must set out the extent of the restriction on the affected person's legal capacity and the applicable guardianship regime, which will vary from case to case. As a result, the level of consultation with the person who has been declared incapacitated regarding the decisions taken by the relevant guardian will depend on the type of guardianship regime established in the judgment.

It is the judgment that determines the extent to which the person with disabilities shall be consulted in the decisions taken by guardians.

There is no provision for a periodic revision of the measures initially adopted, although new proceedings can be initiated to modify or cancel the first ruling.²⁵⁴

Guardianship regimes²⁵⁵

There are three different types of guardianship regime for a person with disabilities:

- full guardianship (extending to the property of a person with disabilities and welfare issues, except where excluded by law or by the relevant judgment);
- limited guardianship (usually limited to giving persons with disabilities assistance with economic matters); and
- judicial defender.

Guardians are appointed by the judge in the incapacitation proceedings. It is possible for a person to appoint his/her own guardian in advance of becoming legally incapacitated, although the judge can override this decision in certain cases.

Intimately personal rights

Certain rights are considered extremely personal and can be undertaken by a person with disabilities considered to lack legal capacity, as long as such person has "natural capacity", i.e. a sufficient understanding of the decision to be taken.

- Personal rights include the right to:
- honour, personal privacy and one's own image;
- make a will;
- vote;
- marry;
- recognise a child as one's own;
- abortion; and
- sterilisation.

Protected estate²⁵⁶

The law allows a "protected estate" to be created in order to provide a person with disabilities with economic protection. This can be set up by the beneficiary, relatives or guardians or by judicial order.

ENTERING INTO CONTRACTS

General

Persons who have been declared legally incapacitated cannot enter into contracts and must be represented by their guardian in any such contract. However, the guardian requires prior judicial authorisation for acts that go beyond acts that are merely administrative.

Banking/property²⁵⁷

No judicial authorisation is required for a guardian to open bank accounts and deposit or withdraw money. Judicial authorisation is required, however, to lend and borrow money, dispose of or encumber real estate, precious objects or securities, or enter into any agreement that is subject to formal registration, or to incur extraordinary property expenses.

Employment²⁵⁸

Employee legislation requires persons to have full legal capacity in order to be able to enter into a contract of employment. For a person with disabilities, consent must be granted by that person's quardian.

Insurance²⁵⁹

Discrimination towards persons with disabilities when contracting insurance is forbidden by law. In particular, the law prohibits the denial of access to insurance contracts, the establishment of different procedures for persons with disabilities to enter into an insurance contract or the imposing of harder conditions due to a person's disabilities, except when these are justified, proportionate and reasonable and are previously and objectively documented.

FAMILY

Inheritance/Making a will²⁶⁰

Guardians of persons with disabilities must obtain judicial approval once they have accepted, rejected or divided an inheritance on behalf of the person with disabilities.

Persons with disabilities can make wills if the incapacitation judgment so provides. If it is silent on the matter, the notary who is to make the will must appoint two physicians to evaluate the capacity of the person with disabilities to make a will.

Marriage and sexual relations

As described above, a person who has been declared incapacitated and who wishes to marry must obtain a medical opinion on their ability to give consent to matrimony. This will be given if the person with disabilities is judged to have sufficient "natural capacity" to understand the nature of the decision taken.²⁶¹

Consent to sexual relations cannot be given by a guardian. The Spanish criminal law also seeks to protect persons with disabilities by punishing sexual relations with persons with insufficient mental capacity.²⁶²

Parental rights²⁶³

There is no limit on the right of an incapacitated person to have a child, although certain restrictions apply, including that judicial approval is required for an extra-marital child to be recognised by an incapacitated person and that parental authority is exercised by the non-incapacitated person.

Abortion²⁶⁴

Consent to abortion can be provided by an incapacitated person's guardian, without judicial authorisation being required.

DISCRIMINATION (ON GROUNDS OF DISABILITIES, INCLUDING MENTAL ILLNESS)

Access to goods and services²⁶⁵

Spanish law forbids discrimination against persons with disabilities in the provision and use of public goods and services, although differences in treatment are admissible, if justified, and appropriate, proportionate and necessary.

Specific provision is made to facilitate access to parking, public transport, public housing and for the adaptation of housing for persons with disabilities.

Education

The Spanish Ministry of Education must ensure that students with special educational needs are supported. In exceptional cases, children with disabilities or severe behavioural problems can be schooled in separate centres if their needs cannot be met in mainstream schools. A report by a Spanish NGO²⁶⁷ found that, although the principles of the Spanish educational system are in accordance with the CRPD, specific procedures and practices are not.

The law provides for entrance exams for access to public universities to be adapted, as necessary, to allow for the needs of persons with disabilities and a certain number of places to be reserved for students with disabilities.²⁶⁸

Employment

Employees are protected by law against discrimination on grounds of their disabilities. The law distinguishes between direct and indirect discrimination and between work in the private sector, public sector, sheltered employment and self-employment.²⁶⁹

A certain percentage of jobs in the private and public sectors must be reserved for persons with disabilities, the selection process in the public sector must be adapted for persons with disabilities ²⁷⁰ and necessary adjustments must be made to the workplace to adapt it for the needs of persons with disabilities.

ACCESS TO JUSTICE

Ability to approach judicial authorities

All natural persons may be party to civil proceedings, but those who have been declared incapacitated may not appear in court.²⁷¹

Legal aid is available to mentally handicapped individuals who are the victims of abuse or mistreatment, whether or not they have the means to litigate.²⁷²

Ability to challenge appointments of guardians²⁷³

When an order of incapacitation is sought, the person with disabilities may appear before the court with their own defence and representation. If he/she does not do so, the interests of the person with disabilities will be defended by the public prosecutor or by a judicial defender. On a change of circumstances, the person with disabilities (or his/her relatives or public officials) can file new proceedings to overturn any incapacity order imposed.

Once appointed, guardians can be removed from their position in certain circumstances, including ineligibility, misbehaviour, ineptitude and serious and ongoing problems between the guardian and the ward.

Removal of a guardian may be requested by the public prosecutor, the ward or other interested party. The interested party and the ward (if he/she has sufficient judgement) may be heard by the court.

Under Spanish criminal law, it is an offence for a guardian to fail to fulfil his/her legal duties or abandon his/her ward. Offenders may be disqualified from acting as guardians. The felony must be reported by the victim, his/her legal representatives or the public prosecutor.

HEALTH

Consent to treatment²⁷⁴

As a general rule, a patient must consent to actions affecting his/her own health, and can choose between clinical options available and whether or not to refuse treatment.

Consent must, however, be granted by a representative in certain cases, including where:

- a patient is judged medically unable to make a decision or to understand his/her situation in this case, consent is given by relatives; and
- a patient has been declared legally incapacitated consent must be given by the patient's legal representative.

Involuntary committal²⁷⁵

Incapacitated persons may be committed to a health centre without their consent if authorised by judicial order. This applies even if the person with disabilities has a guardian.

Medical investigations²⁷⁶

Persons with disabilities who have been declared legally incapacitated can only take part in medical investigations in certain circumstances. These include where the procedures can produce real and direct health benefits, it is not possible to carry out the research on non-incapacitated people, the rights of the persons with disabilities have been made known to him/her to the extent the persons with disabilities can understand them and any wishes/objections previously expressed by the persons with disabilities have been taken into account.

Sterilisation

Under Spanish criminal law,²⁷⁷ the sterilisation of an incapacitated person is punishable unless it has been authorised by a court. The court must take the best interests of the incapacitated person as its guiding principle.

POLITICAL RIGHTS

Right to vote/stand for election²⁷⁸

The right to vote and stand for elections is guaranteed by the Spanish Constitution. Further, the law specifically provides for persons with disabilities to participate in public and political life and requires public entities to provide the necessary resources.

People who have been declared incapacitated or who are hospitalised in a psychiatric hospital by judicial order retain their right to vote or stand for elections, unless the judicial order expressly provides, on a case-by-case basis and for specific reasons, that the person with disabilities cannot vote or stand for elections.

Ability to serve in the armed forces²⁷⁹

Medical requirements apply for entry into the Spanish armed forces, which may exclude persons with disabilities from entering into the armed forces.



ARGENTINA

Report provided by: HSBC and Bruchou Fernández Madero & Lombardi Abogados

INTRODUCTION

In Argentina, an individual is considered disabled when he/she bears a permanent functional or prolonged physical or mental impairment which, in relation to his/her age and social environment, involves considerable disadvantages for his/her family, social standards, education or employment.

The law²⁸⁰ provides for benefits for persons with disabilities such as comprehensive rehabilitation, employment, training, loans and grants to facilitate professional or intellectual activity, social security, schooling with necessary support, guidance and individual, family and social promotion.

This is based on the principles set out in Argentina's Constitution,²⁸¹ which guarantee equality of opportunity and treatment, and the full enjoyment and exercise of the rights recognised in the Constitution and international human rights treaties, particularly with regard to children, women, and people with disabilities.

IMPLEMENTATION OF ARTICLE 12 OF THE CRPD

Argentina signed the CRPD in 2007 and ratified it in 2008. The CRPD has been incorporated into national legislation.²⁸²

The President has also set up a programme to assist persons with disabilities ²⁸³ in order to meet the obligations in the CRPD and, in particular, the obligation to ensure effective access to justice for persons with disabilities.

The programme is implemented by the Ministry of Justice and is part of the social inclusion policies of the Argentinian government, brought in with the aim of strengthening the rights of persons with disabilities, through proper procedures, communication and information.

LAW RELATING TO PERSONS WITH DISABILITIES

The Argentine Civil Code²⁸⁴ provides the main legal framework for acting on behalf of adults who lack the capacity to make certain decisions for themselves. Disabilities and restrictions that affect a person's capacity must be expressly noted in legislation. Therefore, judges cannot declare disabilities other than those specifically indicated by law, since it is impossible to determine them by analogy.

Identifying lack of capacity

Persons with disabilities are deemed to have the capacity to act²⁸⁵ and can carry out all sorts of legal acts except certain inter vivo acts of disposition and acts of management that are prohibited by the judgment stating the disability unless they are carried out with the assistance of the curator. Persons with disabilities can also carry out strictly personal acts such as getting married, drafting wills, recognising illegitimate children, etc.

A person with disabilities will be considered a legally disabled person when his/her psychosocial abilities have decreased and a judge considers that the exercise of his/her full capacity could cause damage to his/her person or property.²⁸⁶ Individuals who have been declared disabled by a judge are legally considered to be like children (under the age of 18) in relation to their persons and property.

Persons with disabilities can obtain a Unique Disability Certificate.²⁸⁷ The Certificate states that the person has a disability and the State must ensure that equal access to services and benefits are granted. This is a public document that is key for persons with disabilities to access the health system and its benefits. The process for obtaining such a Certificate is voluntary and begins by an application to the relevant person's local Evaluation Board offices. The process involves an interdisciplinary consultation in which professionals determine, according to the documentation submitted by the applicant, whether or not he/she falls within the current standards for Certification of Disability.

Benefits available for those who obtain such Certificate include:

- 100% cover for the costs of treatment and of medication diagnosed and recorded in the Certificate;
- free access to the national public transportation network;
- rights of free transit and parking; and
- family allowances and tax exemptions (which require additional administrative proceedings).

APPOINTMENT OF A GUARDIAN

A legal guardian (also known as a curator) shall be appointed by a judge for a person with disabilities and the rules regarding the declaration of dementia and rehabilitation will apply as appropriate.

In order of preference, a guardian (curator) can be a person's:

- spouse;
- adult child;
- parent; or
- where none of the above are in a position to take on this role, the court shall assign the person who best fits the role. In the absence, refusal or inability of family members to take on this role, Public Trustees are used.

To challenge the appointment of a guardian, in cases of conflicting interests between the guardian and the person with disabilities, a special guardian will need to be appointed. In such event, the Pupilar Minister will be involved.²⁸⁸ The Pupilar Minister is the branch of the Public Ministry whose mission is the defence of the rights and interests of children and of other people that are affected by a disability, in accordance with the Civil Code.

NEW CIVIL AND COMMERCIAL CODE

On 1 October 2014, the Lower House passed a bill approving a new Civil and Commercial Code (hereinafter, "CCC"). Although the bill was going to become effective as of 1 January 2016, the Senate has given the green light for the CCC to be implemented early, on 1 August 2015. The CCC includes 2,671 new articles and contemplates a significant review of the legal framework such as civil and commercial matters.

Regarding persons with disabilities, the CCC establishes two categories depending on the extent of the limitation of a person's capacity: 1) people with disabilities and 2) people with restricted capacity. The extent and scope of a disability is determined by judicial decision. The judge determines whether the person should be declared incapable, or instead the judge opts for the restricted capacity regime: by the representation system, assistance system or mixed system (this could be for certain acts, if determined in this manner).

The judge may declare a person incapable when, due to a mental illness, he/she cannot manage his/her person or the administration of his/her property.²⁸⁹

On the other hand, the restricted capacity regime proceeds when the facts do not justify the determination of disability, but "an addiction or a permanent or prolonged mental impairment, of sufficient severity exists and the judge considers that exercising its full capacity may result in damages to its person or property". Persons subject to this regime will be limited to being able to do only certain acts expressly determined in the judicial sentence by itself (without requiring representation or assistance). The principle governing this category is capacity.

ENTERING INTO CONTRACTS

The basic status of persons with disabilities, in accordance with the rule in the Argentine Civil Code,²⁹⁰ is one of capacity. Therefore, notwithstanding inter vivo acts of disposition and acts of management specifically prohibited by the judgment stating the disability, persons with disabilities can carry out all sorts of legal acts.²⁹¹ In this sense, all contracts and any other act involving the disposal of money are generally subject to this doctrine. If considered convenient for the persons with disabilities, a judge may rule that persons with disabilities may acquire rights or contractual obligations through a legal representative. The representation of these individuals extends to all acts of civil life.

A person with disabilities will be considered a legally disabled person when his/her psychosocial abilities have decreased and a judge considers that the exercise of his/her full capacity could cause damage to his/her person or property.²⁹² Individuals who have been declared disabled by a judge are legally considered to be like children (under the age of 18) in relation to their persons and property. The person with disabilities may carry out administrative acts, unless they are prohibited under the judgment which requires prior confirmation by the curator.

FAMILY

To get married, the contracting parties must be able to express their free will; otherwise the marriage will not have any civil effect. If a person with disabilities is not able to express his/her free will, a judge must approve a dispensation for the marriage to take place.²⁹³ If either of the parties is unable to attend the Argentine Civil Registry, the marriage may be held at the home of a disabled person or at his/her current residence, with four witnesses.

Inheritance (administration of property)

Curators are only permitted to perform administrative acts of custody and preservation of inheritance, and those necessary for the collection of credits and the payment of debts. The number of curators may be two or more. Such curator(s) can be appointed to the property of a deceased person with disabilities whose inheritance has not been accepted, if an executor has not been appointed to administer the property.

In general, an heir may disclaim or accept an inheritance if they have free administration of personal property. Persons with disabilities, however, cannot accept or disclaim their inheritance unless certain legally required conditions and procedures to account for their disability are followed.

Parental rights

Where both parents are persons with disabilities and the judge declares that they do not possess the skills to perform familial and parental roles, their children shall be subject to guardianship. The courts take into account the best interests of the children in determining whether separation is necessary and this is subject to judicial review. Such parents do not lose the right to usufruct the property of their children.²⁹⁴

Abortion

An abortion performed by a licensed physician with the consent of the pregnant woman is not punishable where (i) it is done in order to avoid danger to the life or health of the mother and if this danger cannot be avoided by another means and (ii) if the pregnancy is a result of rape or indecent assault committed on a disabled woman. In this case, the consent of her legal representative shall be required for the abortion.²⁹⁵

Sterilisation

The decision to limit procreation (forced sterilisation) is considered a self-referential conduct that does not harm third parties and is an action free from the State's interference and free from any prohibition, in accordance with the right to family planning.²⁹⁶

The decision to limit procreation (forced sterilisation) is strictly a personal and non-transferable right that remains with the mentally disabled individual.²⁹⁷ In this sense, a guardian lacks standing to seek authorisation in order to perform any kind of reproductive preventive measures (such as, surgery to tie the fallopian tubes).²⁹⁸ The functions of a curator are solely of assistance.

For example, in a case where the parents of a child who had mental issues, but had not been declared legally disabled, sought to obtain an authorisation in order to tie the child's fallopian tubes. The judge authorised the practice but the minor's counsel appealed. The Court of Appeals reversed the first judgment and held that an authorisation to carry out forced sterilisation on a person who suffers from mental issues cannot be granted, since there are no valid reasons for such therapeutic intervention, nor any evidence that the person in question cannot exercise her maternal role or that her intellectual limitations could prevent her from providing informed consent. Moreover, there were other non-aggressive alternative methods of contraception, which would not affect her reproductive health and fertility.

DISCRIMINATION

Employment

No fewer than 4% of the employees of the State, non-State public authorities, State enterprises, public services and private companies must be people with disabilities who meet the conditions of eligibility. These employers must establish reserves of jobs that can be exclusively carried out by persons with disabilities.²⁹⁹ A psychiatrist was permitted to hire a person with disabilities as a regular employee in the hospital where the person with disabilities was being treated. The judge authorised the employment and considered it was his role to find the correct balance between due protection for the person with disabilities whilst permitting that person's progress and ability to be a useful member of society.

Access to goods and services

The Ministry of Health is responsible for developing plans and activities in non-profit organisations and issuing the Certificate certifying disability throughout the country. The National Ministry of Health certifies the existence of the disability, its nature and extent, the possibilities of rehabilitation of the affected person and indicates what type of work or professional activity could be performed.³⁰⁰

Vehicles for the disabled

The Argentine government provides benefits under Law 19.279 "Disabled Comprehensive Protection System" in order to facilitate the acquisition of vehicles for personal use. Persons with disabilities can opt between the benefits granted by the law, under which they can request the State's contribution to the acquisition of a national automobile (which shall not exceed 50% of the price of the standard retail car³⁰¹) or a loan could be granted by Argentina's National Bank for the purchase of a domestically manufactured vehicle (with a maximum amount of 70% for the government's contribution).

Basic System for habilitation and rehabilitation for people with disabilities

The basic system of benefits to habilitate and rehabilitate persons with disabilities include the following:

- Educational benefits: includes school, job training, workshops and others. Developed programmes must be scripted and supervised by the competent official body applicable.³⁰²
- Welfare benefits: those that cover the basic requirements of people with disabilities, such as housing, food and specialised care.
- Specific services: they are basic benefits regarding type and grade, age and socio-family situation.
- Early stimulation: educational process that promotes and encourages the harmonious development of different child stages.
- Day centre: a service for children, young and adult with severe disabilities in order to enable the most suitable performance of their daily lives, through the implementation of activities to achieve the maximum possible development of their potential.³⁰³
- Homes: institutional resource that aims for full coverage of the essential basic requirements (home, food, specialised care).³⁰⁴
- Access: People with disabilities, among others, should receive priority attention and be exempted from waiting in line (if impossible, they should be provided with adequate seating).³⁰⁵

The right to access justice has been guaranteed for persons with disabilities under the Argentine Civil Code

ACCESS TO JUSTICE

Intervention in lawsuits

Considering that restrictions to capacity should only be enforced to the minimum extent necessary to ensure the well-being of the person in question, the ability of a person with disabilities to intervene in judicial proceedings should not be restricted. Such a person should be represented by a quardian.

The right to access justice has been guaranteed for persons with disabilities under the Argentine Civil Code, 306 unless their disability affects their capacity for such proceedings or the proceedings were the trigger of their disability. Where the person in question is declared legally disabled under the Civil Code, his/her ability to intervene in lawsuits could be restricted because, although his/her condition may seem to be stable and without alterations in his/her behaviour, he/she could still represent a danger for him/herself and for others. 307

In accordance with the national law adopting the CRPD, the State must ensure effective access to justice for persons with disabilities on an equal basis with others, including training for those working in the field of administration of justice, and through the provision of procedural and age-appropriate accommodations to persons with disabilities, in order to facilitate their effective role as direct and indirect participants, including as witnesses in all legal proceedings, which also include the investigative and other preliminary stages.³⁰⁸

Health

As noted above, the Ministry of Health is responsible for developing plans and activities in non-profit organisations; and for issuing the Certificate certifying disability throughout the country.³⁰⁹ The National Ministry of Health certifies the existence of the disability, its nature and extent, the possibilities of rehabilitation of the affected person and indicates what type of work or professional activity could be performed.³¹⁰

POLITICAL RIGHTS

Right to vote/stand for elections

Regarding the right to vote, the President of the Voting Table or any of its members are allowed to help the voter enter the premises where the ballots are.³¹¹ The following categories of people are excluded from the electoral register: a) people with mental disabilities, as long as they have been declared legally incapable, with a lack of discernment; and b) people who are deaf and who are unable to express their will in writing (but not deaf and dumb people who can write, speak and/or hear). Where persons with disabilities have been declared legally disabled, under the Argentine Civil Code, they are disqualified from the Voting Registry without the conservator. ³¹²

BRAZIL

Report provided by: HSBC and Campos Mello Advogados

INTRODUCTION

In Brazil, a person is considered to have an intellectual disability when he/she has limitations related to two or more adaptive skills areas, such as: (i) communication; (ii) personal care; (iii) social skills; (iv) use of community; (v) use of the community resources; (vi) health and safety; (vii) academic skills; (viii) leisure; and (ix) work.³¹³ The relevant legislation also provides for the concept of multiple disabilities, which is the association of two or more disabilities.

IMPLEMENTATION OF ARTICLE 12 OF THE CRPD

The CRPD was ratified by Brazil in 2008 and incorporated into Brazilian law in 2009.³¹⁴

The CRPD was received with the status of constitutional rule, given that the Brazilian National Congress approved it with a special quorum, as established in the Brazilian Constitution. Therefore, the entire CRPD is above ordinary statutes and has to be respected by every Brazilian citizen. As part of the Convention, Article 12 of the CRPD has the same statutory strength as a constitutional rule, which means that it cannot be violated by any of the Executive, Judiciary or Legislative branches, unless there is a constitutional amendment concerning the matter.

With regards to the implementation of Article 12 of the CRPD in Brazil, there are several rules that ensure its content and enforceability, such as the Brazilian Civil Code, the Brazilian Penal Code and the Brazilian Constitution itself. For example, as concerns the equal recognition before the law as an example, Article 5 of the Brazilian Constitution ensures that every person is equal before the law, and prohibits any discrimination, including that directed towards persons with disabilities, except in the cases established by the Brazilian Constitution. Likewise, the Brazilian Civil Code recognises that persons with disabilities enjoy legal capacity on an equal basis with others in all civil aspects.

In its Third and Fourth Articles, however, the Brazilian Civil Code restricts the personal exercise of civil capacity, when the person has a mental disability that compromises the manifestation of the will. In such cases, the person will be declared unable to personally perform the acts of civil life and will need an assistant or a representative (depending on the degree of the disability) to assist/represent him/her in the practice of civil acts, otherwise such acts may be considered null and void.

Article 12 of the CRPD, which determines that States Parties shall take appropriate measures to provide access for persons with disabilities to the support that they may require in exercising their legal capacity, the Brazilian Civil Code also provides for persons with disabilities who lack legal capacity in all civil matters. Thus, the State will appoint a guardian, who will take care of the equity, inheritance and property issues of the person with disabilities.

Article 12, Item 4 of the CRPD is related to the respect of the rights, will and preferences of the person with disabilities, who lacks legal capacity, establishing that the State must ensure that the exercise of legal capacity is free of conflict of interest and undue influence. Once again, the Brazilian Civil Code, specifically in Articles 1,740 to 1,766, ensures that the property of the person with disabilities is protected from fraudulent disposals and negligence, in general, stressing that the judge must inspect and investigate if the guardian is adequately safeguarding the will and best interests of the person with disabilities. Furthermore, if the judge finds that the guardian is not performing his/her duties with all the care and good faith required, the judge is able to remove the guardian and sentence him/her to compensate the person lacks legal capacity.

Finally, Article 12, Item 5 of the CRPD determines that State Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property. In Brazil, the right of property is a constitutional right and persons with mental disabilities cannot control their own financial matters by themselves, given that all civil acts, including financial contracts, must be performed with the assistance/representation of the guardian.

LAW RELATING TO PERSONS WITH DISABILITIES

Among the main Brazilian Federal Laws, the following ones have specific provisions related to persons with disabilities:

- Constitution of the Federative Republic of Brazil, dated as of 5 October 1988, which
 guarantees the financial support, social integration, disability prevention and
 comprehensive rehabilitation, including healthcare, educational assistance and
 occupational training for persons with disabilities. It also forbids employment
 discrimination and establishes a quota for the number of persons with disabilities to be
 hired by the government.³¹⁵
- Federal Law No. 7,853, dated as of 24 October 24 1989, which specifically protects the rights of persons with disabilities. This law contains provisions regarding the support of persons with disabilities, their social integration and the National Coordination Office for the Integration of persons with disabilities ("CORDE").³¹⁶
- Federal Law No. 8,112, dated as of 11 December 1990, which adopts provisions concerning the legal system for public servants of the Union, governmental agencies and Federal public foundations.³¹⁷
- Federal Law No. 8,213, dated as of 24 July 1991, which, among other provisions, establishes a quota of employees with disabilities to be hired by the companies. In accordance with this law, a company with 100 or more employees is required to fill between 2% and 5% of its positions with rehabilitated employees or employees with disabilities.³¹⁸

- Federal Law No. 8,742, dated as of 7 December 1993, which adopts provisions concerning the organisation of social assistance and other measures. Tederal Decree No. 3,298, dated as of 20 December 1999, which regulates Federal Law No. 7,853/1989 and includes provisions on the National Policy for the Integration of persons with disabilities.
- Federal Law No. 10,048, dated as of 8 November 2000, which requires priority services to people with disabilities and persons older than 60 years old, among other groups. Federal Law No. 10,098, dated as of 19 December 2000, which establishes general rules and basic standards to promote accessibility for persons with disabilities or persons with reduced mobility and other measures. Federal Law No. 10,098, dated as of 19 December 2000, which establishes general rules and basic standards to promote accessibility for persons with disabilities or persons with reduced mobility and other measures.
- Decree-Law No. 5,296, dated as of 2 December 2004, which Regulates Federal Law No. 10,048/2000, giving priority treatment to specific people, and Federal Law No. 10,098/2000, establishing general rules and basic standards to promote accessibility for persons with disabilities or persons with reduced mobility and other measures.³²³ Decree-Law No. 186, dated as of 9 July 2008, which approves the text of the Convention on the Rights of persons with disabilities and its Optional Protocol, signed in New York on 30 March 2007.³²⁴
- Decree-Law No. 6,949, dated as of 25 August 2009, which promulgates the International Convention on the Rights of persons with disabilities and its Optional Protocol, signed in New York on 30 March 2007.³²⁵
- Decree-Law No. 12,008, dated as of 29 July 2009, which modifies Articles 1,211-A, 1,211-B and 1,211-C of Law No. 5,869, as of 11 January 1973 ("Brazilian Code of Civil Procedure") and adds Article. 69-A in Law No. 9,784/1999, which regulates the administrative procedure in the Federal public administration, in order to extend the priority in the course of judicial and administrative proceedings and specific people.³²⁶
- Federal Law No. 10,216, dated as of 6 April 2001, which provides the protection of the rights of persons with "mental disorders" and establishes a new approach in an attempt to shift away from the traditional mental health assistance model.³²⁷
- Federal Decree No. 4,360, dated as of 5 September 2002, which amended a previous Decree regulating the permanent assistance benefit for persons with disabilities and the elderly, established by Federal Law No. 8742, as of 7 December 1993.³²⁸
- Federal Decree No. 7037, as of 21 December 2009, which approves the National Programme on Human Rights ("PNDH"). 329

Finally, it is important to highlight the penalties for non-compliance with disability laws. Article 8 of Federal Law No. 7,853/89, for instance, makes the violation of the rights of persons with disabilities punishable with fines and imprisonment of one to four years. Prejudicial treatment of persons with disabilities as a crime is not, however, widely recognised or enforced. Penalties are also specified for non-compliance with employment laws and fines are being increasingly used by Regional Labour Agencies under the supervision of the Ministry of Labour and Employment. The Attorney General Office of Labour Matters is also involved in the defence of the quota of employment.

Incapacitation proceedings

In Brazil, in order to judicially declare a person incapable of performing civil acts, due to a mental disorder in general, it is necessary to file a suit of interdiction, which must follow the Brazilian Code of Civil Procedure, specifically the rules set forth in the Articles 1,177 to 1,182. The interdiction process could be initiated by the father, mother, guardian or close relative of the allegedly disabled person, or even by the Public Prosecutor's Office.

At the preliminary hearing, the judge must examine the defendant, thoroughly interrogating him/her about his/her life, business, property and anything else the judge finds necessary to verify his/her mental state. The defendant will have the right to impugn the interdiction and will be able to retain an attorney.

In this proceeding, which will be supervised by the Public Prosecutor's Office (when this is not the plaintiff itself), to ensure that the best interests of the person with disabilities can be preserved, the judge will appoint a court expert to conduct an investigation to establish whether the defendant is capable or incapable of personally performing the civil acts.

If the expert recognises the disability, the judge will probably declare the person incapacitated, even though the judge is not bound by the expert report when issuing a judgment (in Brazil, the Principle of Freely Motivated Conviction prevails, which means that the judge can be influenced by other evidence, like testimony, for example).

This decision is reached by a single judge and it can be reviewed by the Court of Justice, specifically by the Appeal Court, if there is an appeal from the defendant or from the Public Prosecutor's Office.

In the judgment of interdiction, in a finding for incapacity, the judge will appoint a guardian/committee to be responsible for managing the assets of the person with disabilities, as well as representing the person with disabilities in other civil acts. This guardian/committee should provide commitment and accountability to the judge. If the guardian/committee does not execute its duty properly, it may be removed from its function.

Finally, the declaration of interdiction could be withdrawn if the cause for the incapacity ceases to exist. In that case, by express request of the person with disabilities, the judge will appoint a new court expert to investigate, in order to ascertain whether the incapacity has indeed ceased.

Appointment of a guardian

The Brazilian Civil Code provides that persons with mental disabilities must be safeguarded, concerning all civil matters. Thus, the Brazilian state will appoint a guardian to take care of the equity, inheritance and property issues of the person with disabilities. Decree-Law No. 12,008, dated as of 29 July 2009, regulates the administrative procedure in the federal public administration in order to extend the priority in the course of judicial and administrative proceedings and specific persons.

Ability to challenge appointments of guardians

Brazilian law ensures that the property of a person with disabilities is protected from fraudulent disposals and negligence in general, stressing that the judge must inspect and investigate if the guardian is adequately safeguarding the will and best interests of the disabled person.³³⁰ Furthermore, if the judge finds that the guardian is not performing his/her duties with all the care and good faith required, the judge is able to remove the guardian and render a decision in order to compel the guardian to compensate the person who lacks capacity.

ENTERING INTO CONTRACTS

Banking/property

In Brazil, the right of property is a constitutional right that is guaranteed to all citizens, since they respect the principle of social property. As explained above, however, a judge may declare that a person with a mental disability cannot control their own financial matters by themselves, in which case all civil acts, including financial contracts (bank loans, etc.), must be performed with the assistance/representation of the guardian.

Employment

The Brazilian Federal Constitution guarantees financial support, social integration, disability prevention and comprehensive rehabilitation, including healthcare, educational assistance and occupational training for persons with disabilities. It also prohibits employment discrimination and establishes a quota for the number of persons with disabilities to be hired by the government. Finally, the Constitution mandates the creation of accessibility standards for public buildings, facilities and transportation.

Also, persons with disabilities have the right to sign up to public examination for positions whose duties are well suited to persons with such disabilities: up to 20% of the positions offered in the contest will be reserved for those.

FAMILY

Family rights

The Brazilian Constitution introduces, with Article 227, the duty of the family, society and the State to care for children and adolescents, with absolute priority, the right to live well, having access to health treatments and medicines, nourishment, education, leisure, professional training, culture, dignity, respect, freedom, and family and community life, as well as to safeguard them from all forms of negligence, discrimination, exploitation, violence, cruelty and oppression. Persons with disabilities have the same rights in relation to family, including parental rights, adoption cases and filiation, as any other citizen subject to Brazilian law.

Marriage

Marriage by persons with disabilities can occur as established in Article 1.514 of the Brazilian Civil Code: "marriage is accomplished at the moment in which a man and a woman manifest, before the judge, their wish to establish matrimonial bonds, and the judge declares that they are married". Marriage will be void, however, according to Article 1.548, item I, if entered into by a person with disabilities without the necessary discernment to carry out civil acts.³³¹

In cases of trusteeship regimes, the trustee must intervene in civil acts during the judicial term of trusteeship of a person with disabilities (information about this regime could be found in Articles 1.540 and 1.767 of the Civil Code). However, the Brazilian Civil Code prohibits marriage between the trustee/curator and the person who is under the legal trusteeship regime (or under the legal guardianship), at least during the guardianship. This prohibition is above any other rule, even if the person with disabilities wants to marry his/her guardian, the law forbids it.³³²

Inheritance rights

In Brazil, persons with disabilities have the same inheritance rights as any other Brazilian citizen. In this sense, Article 1798 of the Brazilian Civil Code establishes that all persons (including persons with disabilities) born or already conceived at the time of opening the succession can legitimately receive inheritance.

However, Article 1860 of the Civil Code states that persons with disabilities cannot write a will, considering the risk of not being able to properly express themselves in their will.

Finally, according to Article 1.963, item IV, of the Civil Code, regarding the inheritance rights (law of succession), the disinheritance of a child from the parent is authorised in cases where the child or grandchild has mental disabilities or serious illness. The child could challenge the will or the inventory expressly and challenge the cause of disinheritance within four years of the opening of the will.

DISCRIMINATION (ON GROUNDS OF DISABILITIES, INCLUDING MENTAL ILLNESS)

Access to goods and services

Brazilian law forbids discrimination against persons with disabilities in the provision and use of public goods and services, and also with respect to wages and the hiring of workers with disabilities.

The government created some rules to facilitate access to parking, public transport, public housing and for the adaptation of housing.

Education

The law provides that public administration agents must give priority treatment to issues connected to education, including for persons with disabilities in the educational system, by offering special schools and giving support to coach the teachers in these schools. The law also provides that persons with disabilities must be treated equally in relation to school food, materials and scholarship.

Employment

The Brazilian Constitution prohibits employment discrimination and establishes that a proportion of public positions shall be aimed at persons with disabilities. It also establishes accessibility standards for public buildings, facilities and transportation.

In relation to professional capacity and work, the government must provide full support to ensure access to persons with disabilities and must encourage private enterprises to employ disabled persons. In addition, public services must reserve a proportion of job vacancies for persons with disabilities. As a minimum, persons with disabilities must have full access to every building and .public administration agents must remove any obstacle to this access.

Health

According to Article 8 of Law 7.853, of 24 October 1989, it is a crime, punishable by imprisonment of one to four years and a fine, to refuse, delay or create difficulties for the hospitalisation of, or to fail to provide medical, hospital and outpatient assistance to, persons with disabilities.

ACCESS TO JUSTICE

Ability to approach judicial authorities

In Brazil, persons with mental and physical disabilities can judicially claim for a right. However, Brazilian legislation restricts the personal exercise of civil capacity when the person has a mental disability or an illness that compromises (either in part or fully) the manifestation of the will. This is a protective rule, since it envisages the need to defend a person from a temporary or permanent lack/reduction of judgment in the performance of acts which affect their legal position in any form. In such cases, the person will be declared civilly unable to personally perform acts of civil life and will need an assistant or a representative (depending on the degree of the disability) to assist/represent him/her in the practice of civil acts or such acts may be considered null and void.³³³ For example, a guardian can bring legal proceedings on behalf of a person with disabilities.

HEALTH

Consent

In Brazil, there are several contested legal issues regarding consent in healthcare matters, and litigation is increasing in relation to consent issues. Many aspects need to be taken into consideration for consent to be considered valid, such as whether the risks have been explained, whether the patient is a minor (if so, capable or not of deciding by him/herself); whether an adult patient has legal capacity to decide (and also, if having legal capacity to decide, clinical capacity is absent), among others. Above all, a determining factor will be whether the patients have been given sufficient, adequate and complete information, so that they can actually decide, and not just consent to a physician's suggestion will be a determining factor.

The process of consenting constitutes, at the same time, a patient's right and a physician's duty.³³⁴ The patient must be informed in a clear and comprehensible way, according to his/her cognitive capabilities, about his/her diagnosis, risks, prognosis and alternative treatments available, even those the doctor does not think fit for the specific case. When a patient is judicially considered unable/incapable of understanding his/her situation or deciding for him/herself, this consent must be granted by a legal representative, appointed by a judge, such as a guardian. The person with disabilities has the right to challenge a decision taken, but it must be taken before a court, with the intervention of the Public Prosecutor's Office. Otherwise, it will be considered null and void.

Right to information

In Brazil, Federal Laws, such as Law 8.080, of 11 September 1990 (Consumer's Defence Code) reinforce the patient's right to information about his/her health conditions. Specifically with regard to persons with disabilities, Article 2, Sole Paragraph, of Law 10.216/2001 states the protections and rights of people with mental disorders and redirects the mental healthcare model, providing that persons with intellectual disability have, among others, the right to (i) have a medical presence at any time, in order to clarify the necessity or not of involuntary hospitalisation; (ii) have free access to the means of communication available; and (iii) receive the maximum information regarding their illness and its treatment.

Hospitalisation

Moreover, Article 6 of the Law mentioned above establishes that psychiatric hospitalisation shall only be realised through a detailed medical report that features its reasons. The following types of psychiatric hospitalisation are considered: (i) voluntary hospitalisation with the consent of the patient; (ii) involuntary hospitalisation without patient consent and on the request of a third party; and (iii) compulsory hospitalisation which is determined by the Brazilian Justice system.

Registration as a voter and the exercise of voting right itself are mandatory for every Brazilian citizen who is 18 years old or older.

POLITICAL RIGHTS

Right to vote/stand for election

According to Article 14, first paragraph, of the Brazilian Constitution, registration as a voter and the exercise of voting right itself are mandatory for every Brazilian citizen who is 18 years old or older. However, Article 15, II, of the Brazilian Constitution has an exception according to which the political rights of a citizen will be suspended (or revoked), among other situations, in case of a judicial declaration of absolute mental disability, since in this case the individual cannot express his/her real intention to vote. The suspension of political rights prevents a person from voting and from standing for election and being voted for.³³⁵

In the absence of an absolute disability (declared by a competent judge according to the defined legal procedures), persons with disabilities are mandatorily required to vote, in accordance with Resolution n° 21920-04 of the Superior Electoral Court. On the other hand, this same resolution provides that persons with disabilities will not be sanctioned if the fulfilment of their electoral duties is too painful or impossible due to their disabilities. In such case, at the request of the person with disabilities or his/her legal representative, the judge will issue an exemption certificate, without an expiration date.

Another important resolution of the Brazilian Superior Electoral Court is Resolution n° 23.399-14, which regulates the general procedures for the 2014 elections, allowing people that are considered reliable by the person with disabilities to assist them during the voting procedure. The person assisting the person with disabilities may even enter the numbers of the candidates into the electronic ballot box. This reliable person cannot, however, be at the service of any political party or candidate. The same resolution states that persons with visual disabilities will be granted special voting mechanics in the braille system to be able to vote. The Electoral Justice is also responsible for providing special conditions and accessibility for persons with disabilities that intend to vote, in accordance with Resolution n° 21008-02 of the Superior Electoral Court and Federal Decree 5.296/2004 (art. 21, Sole Paragraph).

With regards to the ability of the person with disabilities to run for a public mandate and be voted for it, according to Article 15, third paragraph, of the Brazilian Constitution, such person/candidate must be in the full exercise of his/her political rights, which means that the person with disabilities will not be able to enlist him/herself as a political candidate when his/her disability is so severe that an absolute mental disability is declared by a judge and therefore his/her political rights are suspended (as described above). In all other cases of disabilities, which do not result in absolute civil interdiction, the person with disabilities may enlist as a political candidate and be voted for since his/her political rights are intact. Several regional and superior electoral courts' decisions have reaffirmed this principle.³³⁷

Ability to serve in the armed forces

In Brazil, military conscription is mandatory for all men above 18 years of age, according to Article 143 of the Brazilian Constitution. Therefore, even persons with disabilities must personally attend the enlistment (if it is possible) in their eighteenth birthday year, despite being exempted from military service itself, as established by Article 28, item a, of Military Procedural Law n° . 4375/1964. In summary, after the verification of the disability by the Armed Forces, the person with disabilities will receive an exemption certificate, without an expiration date meaning that the person with disabilities is not prohibited from joining the army. The only condition is to pass the physical and psychological tests, imposed on all candidates by the Military Medical Board. Thus, if the person with disabilities succeeds in these tests, he/she can serve with the army voluntarily.

MEXICO

Report provided by: HSBC and DLA Piper

INTRODUCTION338

As set out in the Mexican Federal Civil Code, ³³⁹ individuals that have reached the legal age in Mexico³⁴⁰ who are decreased or disturbed in their intelligence, even if they have lucid periods are to be considered incapacitated; and those suffering from any affliction, consequence of persistent physical, psychological or emotional sickness or deficiency, or condition caused by an addiction to toxic substances such as alcohol, psychotropic drugs or narcotics, as long as due to the limitation or alteration in their intelligence that this may produce, are not able to govern and conduct themselves, or manifest their will by any means, will be able to enter into agreements only through a legal guardian (defined in Mexico as a **"Tutor"**).

This is supplemented with the provisions set out in the Mexican General Law for the Inclusion of Disabled People, which defines a "Disabled Person" as any person that due to congenital or acquired reasons presents one or more physical, mental, intellectual or emotional deficiencies, either temporary or permanent, and that, when interacting with the barriers imposed by the social environment, may impede his/her entire and effective inclusion, under the same conditions as everyone else.

The spirit of the aforementioned law relies on the Mexican principle of human rights recognition set out in the Political Constitution of the Mexican United States (the "Mexican Constitution") article 1st, which guarantees equity of opportunity and treatment, and the full enjoyment and exercise of the rights recognised, particularly with regard to children, women, and persons with disabilities.

IMPLEMENTATION OF ARTICLE 12 OF THE CRPD

The CRPD has been ratified by Mexico. The Mexican Constitution contains what has been defined as a "Constitutionality Block", ³⁴¹ formed by all the human rights treaties that have been signed and ratified by Mexico, as well as all the human rights set out in the Mexican Constitution. Therefore, the CRPD is deemed to form part of Mexican legislation, which has been fully incorporated into domestic law. The complete effectiveness of the rights granted by the CRPD is deemed to be guaranteed; therefore, the rights granted by the CRPD are fully available.

As set out in the Mexican Constitution, the CRPD and all international treaties regarding human rights are part of the domestic law and they have to be fully respected and widely protected in accordance with the principles of universality, interdependence, indivisibility and progressiveness.

In accordance with the aforementioned, Mexican laws and regulations shall be harmonious with the provisions of the CRPD, since it has been ratified by Mexico and is part of the above-mentioned Constitutional Block, meaning that the provisions set out in the CRPD have been upgraded in Mexico to a constitutional level.

The Mexican General Law for the Inclusion of Disabled People incorporates part of the CRPD text into the definition of a "Disabled Person".

LAW RELATING TO PERSONS WITH DISABILITIES

The Mexican Federal Civil Code provides the main legal framework for acting and making decisions on behalf of adults who lack the capacity to make particular decisions for themselves. Capacity is construed as a rule, founded in the essential respect for freedom and human dignity, while disabilities and restrictions must be expressly mentioned by law as exceptions. Thus, judges may declare incapacity following a pre-set process set out in the Mexican Code of Civil Procedure.

The basic status of mentally disabled people is capacity, in accordance with the rule set out by Mexican Federal Civil Code article 450;³⁴² the general rule in Mexico is that everybody can enter into agreements and carry out legal acts, except those referred to expressly in Article 450 of the Mexican Federal Civil Code.

Disability is a legal term which does not prevent persons from exercising all civil acts. The disabled individuals can execute acts by means of a legal representative.

Under Mexican law, two kinds of legal capacity have to be distinguished:

- Capacity to acquire and enjoy legal rights. Everybody has this kind of legal
 capacity; it consists of the ability of every person to be entitled to rights and acquire
 obligations; that is, to be subject to law. It is acquired by birth and lost with death.³⁴³
- Capacity to enforce legal rights. As set out in Mexico's Civil Code, not every person has this kind of legal capacity. It consists of the ability of people to exercise rights and acquire obligations on their own. As a general rule this kind of legal capacity is not attributed to: (i) minors; or (ii) people who are not considered capable of making decisions due to a reversible or irreversible disease, or their particular disability, either physical, sensorial, intellectual, emotional, mental, or several of them at a time. This state has to be declared by means of a judicial proceeding; it cannot be left to an individual's opinion. The law provides that legal acts executed by such people must be carried out by means of a legal representative in order to be legally valid, as a protective disposition, so abuses may be prevented.

Identifying lack of capacity

The process for declaration of incapacity of individuals that have reached the legal age in Mexico (18 years old) as a consequence of a reversible or irreversible disease, or of their particular type of disability, whether this is physical, sensorial, intellectual, emotional, mental, or several at a time, that were not able to govern themselves, involves the following.³⁴⁴

The declaration of incapacity may be requested by:

- the incapacitated person's spouse;
- the incapacitated person's legitimate heirs;
- the executor of the incapacitated person's succession;
- the Prosecutor's Office; or
- the social assistance institution that takes in the child(ren) of the presumed incapacitated person.

A judge will be aware that not all disabilities are the same and so a case by case analysis will be carried out to understand the extent of the individual's disability with the intention of guiding and protecting the best interests of the incapacitated individual. A judge will define over which acts the person has full autonomy and which acts require a restriction of this autonomy.

Pre-trial proceedings are as follows:

- Once the judge receives the complaint intended to declare a person as lacking legal
 capacity, such judge shall order the necessary measures for the custody and safety of the
 person with disabilities and their property. Likewise, a medical certification may be
 performed by experts in order to determine that the person is unable to govern
 themselves. The doctors examining the disabled person shall be designated by the judge
 and shall be experts in the medical specialisation related to the disability; the medical
 exams shall be carried out in the presence of the judge.
- Where incapacity is determined from the medical exams or at least sufficiently
 presumed, different medical experts will be called to examine the disabled person. In
 case of disagreement, third-party experts are called in order to settle the differences and
 decide on the incapability of the person.
- Finally, the judge shall appoint an audience, if the Prosecutor's Office member and the Tutor of the incapacitated person agree with the solicitor of the incapacitated person. The judge shall then opine on the incapacity of the person under review.

If objections are made to the proceedings mentioned above, an ordinary trial will have to be followed, in order to hear the arguments in opposition to the declaration of incapacity.

The tutor has to guarantee his/her administration either with a pledge, mortgage or bail and has the obligation to report to the family judge the accounts and status of his/her administration each January, in order for that judge to evaluate his/her performance. The

tutor may be removed from office if poor performance is declared by the judge or it is considered that actions against the incapacitated person's best interests were carried out by him/her.

ENTERING INTO CONTRACTS

The general rule in Mexico is that everybody can enter into agreements and carry out legal acts, as set out in the Mexican Federal Civil Code Article 1798. An exception to this rule is Mexican Federal Civil Code Article 1798 Article 635, which provides that a disabled person cannot perform acts of management or enter into agreements without the prior authorisation of his/her legal guardian.

Indeed the Mexican Federal Civil Code establishes that individuals who have reached the legal age in Mexico, ³⁴⁵ who are decreased or disturbed in their intelligence, even if they have lucid intervals; and those who suffer from any affliction, consequence of persistent physical, psychological or sensitive sickness or deficiency, or condition caused by an addiction to toxic substances such as alcohol, psychotropic drugs or narcotics, as long as due to the limitation or alteration in their intelligence that this may produce, are not able to govern and bind themselves, or manifest their will by any means, will be able to enter into agreements only through a legal guardian, defined as a "tutor".

Without the consent of the *tutor*, a person with disabilities is not able to dispose of his/her property.

The person with disabilities may not execute acts of administration or agreements, without the prior consent of the *tutor*. The person with disabilities will be consulted by his/her tutor where he/she is considered capable of assisting with decision-making. If the person with disabilities enters into agreements by him/herself, such legal acts will be viewed with relative nullity. This means that there will be voidable actions to exercise before such acts in order to leave them without legal effects, due to the lack of legal capacity of the party(ies).

Incapacitated persons may therefore acquire rights or contractual obligations through their legal representatives. However, the representation of incapacitated persons does not extend to those rights referred to as "very personal" rights ("personalisimos"), such as the right to live, vote, be free, be healthy, the right of privacy, to issue a will before a Notary Public, work, etc.

FAMILY

Marriage

Disability is an impediment to getting married, making it voidable. If the person was married and the disability came afterwards, then the marriage would remain fully effective, as long as his/her spouse did not file for divorce.

Inheritance

The Mexican Federal Civil Code provides that individuals who are not permanently or accidentally in their sound mind are incapable of making a will.

An heir may disclaim or accept an inheritance, as long as he/she has the free administration of his/her personal property. An inheritance of a disabled person may be accepted or disclaimed only by his/her legal representative or under the conditions and procedures prescribed by law.

Executors are only permitted to perform administrative acts of custody and preservation, and those necessary for the collection of credits and the payment of debts. The executor's assignment will be terminated if the executor is declared incapacitated.

Parental rights

Where both parents are incapacitated and are not able to comply with the obligations in the Mexican Federal Civil Code to exercise their parental powers, their minor children will be subject to guardianship. The exercise of parental power will be suspended if incapacity is judicially declared. The parent exercising his/her parental power may excuse him/herself due to bad health (either physical or mental). The parents lose the benefits under the Mexican Federal Civil Code derived from the exercise of the parental power (administration of property and half of the usufruct³⁴⁶) when excused from the exercise of parental authority.

DISCRIMINATION

General

The General Law for the Inclusion of Disabled People and the Mexican Constitution establishes that employment discrimination is prohibited and sets out general principles against discrimination. It also states that necessary public policies must be established for the human rights of persons with disabilities to be exercised. Discrimination under this law includes all forms of discrimination, among others, the denial of reasonable adjustment.

Likewise, the Federal Labor Law sets forth a fine that may go from USD\$1,000.00 to USD\$23,000.00, approximately, for carrying out discriminatory conduct when hiring people or during the employment relationship. However, the Federal Labour Law does not consider it to be discriminatory when a position requires special abilities that a person with disabilities is not able to perform, as the case may be.

Access to goods and services³⁴⁷

Disabled people have the right to universal access to goods, services and housing; therefore, standards, guidelines and regulations shall be issued granting accessibility to public or private facilities that permit the free movement in dignifying and secure conditions.

Disabled people have the right to dignified housing and therefore housing programmes of the public and private sectors must always consider disabled people's accessibility needs.

The Mexican Ministry of Communications and Transport will provide disabled people with access to transport and technologies of information and communications.

The Mexican Ministry of Social Development will promote the right of disabled people and their families to a higher standard of living, including appropriate nutrition, clothing and housing, and the continuous improvement of their lifestyle conditions.

The Mexican Ministry of Sport, Recreation, Culture and Tourism will promote the right of disabled people to sports, culture, recreation, the development of their artistic abilities and the protection of their intellectual property rights.

Disabled people have the right to freely express and opine, including the freedom to collect, receive and provide information by any means of communication that facilitates their participation and integration in equal conditions to the rest of the population.

ACCESS TO JUSTICE

The General Law for the Inclusion of Disabled People provides that persons with disabilities have the right to receive dignified and proper treatment in administrative and judicial proceedings which they are part of, as well as free legal assessment and representation in such proceedings, under the terms of each specific law or regulation.

Administration of justice institutions will co-ordinate with specialised experts in diverse disabilities, interpreters of Mexican sign language, as well as the issuance of documents in the Braille Writing System. Such institutions will also implement sensitisation and capacitation programmes targeted to their personnel, regarding the attention and treatment to be provided to disabled people.

The right of access to justice is guaranteed for incapacitated people under the terms of the Mexican Federal Civil Code Article 537, V. The incapacitated person will be represented in any trial by his/her legal guardian (*tutor*).

The *tutor* has to guarantee his/her administration either with a pledge, mortgage or bail and has the obligation to report to the family judge the accounts and status of his/her administration each January in order for that judge to evaluate his/her performance. The *tutor* may be removed from office if poor performance is declared by the judge or it is considered that actions against the incapacitated person's best interests were carried out by him/her.

Mexican Protocol of Action for those who deliver justice in cases where the rights of persons with disabilities are involved

The Mexican Supreme Court of Justice issued a "Protocol of action for those who deliver justice in cases where disabled people rights involved" (the "**Protocol**") the main target of

which is to diminish the barriers that disabled people usually face. It indicates the direction in which justice administrators shall move in relation to disabled people's rights, when involved in any kind of judicial matter.

The Protocol aims to provide a set of technical and legal considerations, founded in the *pro persona* principle,³⁴⁸ therefore contributing to guaranteeing that access to justice may be exercised by disabled people, in accordance with their specific needs.

The Protocol is focussed mainly on disabled people's autonomy of will and their right to participate in decision-making on matters that directly affect them, or in other words, the recognition of their legal capacity. Such recognition has special relevance in Mexico due to the change of paradigm that it represents, being that this matter is regulated by the substitution principle,³⁴⁹ which provides that incapacitated people shall act via legal representative.

The Protocol proposes a change of mentality where mental disabilities should not be seen as an illness, and seeks to eliminate assistance-driven actions. Therefore, the Protocol intends to provide the judges with legal interpretative tools that guarantee in the best possible way, the rights of disabled people.

Ability to challenge appointments of guardians.

Tutor is a Mexican term deemed to be of public interest from which nobody can be exempted, except for legal and plainly justified causes. *Tutor* appointments may be challenged by persons with disabilities or by their relatives and some people are prevented from acting as a *tutor*.

The legal guardian has to carry out all proper actions regarding the incapacitated person, as well as administering his/her goods, and if he/she does not, will be removed from such appointment. Criminal liabilities may arise when actions referred to in the Mexican Criminal Code are carried out by such guardian; however, there are no criminal liabilities specifically due to the failed performance as legal guardian, since this is a civil law offence.

HEALTH

The Ministry of Health is responsible for the promotion of disabled peoples' right to enjoy the highest possible level of health, rehabilitation and empowerment through programmes and services that shall be designed and provided considering quality, speciality, gender, gratuity or affordable price criteria. Local and municipal governments may enter into agreements with public or private entities in order to guarantee the delivery of social assistance services to disabled people.

The Ministry of Health will issue the National Disabilities Classification which will be available to people in general and will be used as a tool for the design of public policies. Such classification provides for all types of disabilities in Mexico, its characteristics and its concentration among the Mexican population; information is used in order to design policies, laws and regulations in order to provide disabled people with the best possible quality of life via infrastructure and system designs that lead to their best inclusion.

The Mexican Standard (which is the official governmental criteria adopted by Mexican authorities) sets out clear guidelines on how to diagnose, treat and rehabilitate people with mental and psycho-social disabilities and the rights to which they are entitled during that process.

POLITICAL RIGHTS

As provided by the Mexican General Law of Electoral Institutions and Proceedings Article 280, 5, people who have lost the use of their mental abilities in accordance with Mexican Federal Civil Code Article 450 will not have access to the voting polls.

ASIA



INDONESIA

Report provided by: Adnan Kelana Haryanto & Hermanto

INTRODUCTION

A person with disabilities generally (apart from the specific instances noted below) is defined as "any person with physical or mental abnormalities that may interfere or is a hindrance or barrier for him/her to perform properly". This is understood to mean anyone who has a physical and/or mental disability and the law does not provide any more detail on what performing properly or ordinarily means. A medical examination is needed to determine whether a person would be considered to have a disability. With regard to autism, pursuant to Article 9 of Law No. 11 of 2009 on Social Welfare and Article 6 letter (q) of Government Regulation No. 39 of 2012 on Implementation of Social Welfare, it is categorised under "person with special needs" and is not included among physical or mental disabilities.

IMPLEMENTATION OF ARTICLE 12 OF THE CRPD

The CRPD was ratified in Indonesia in 2011.³⁵² The ratification is intended to show the sincerity and seriousness of the State of Indonesia towards promoting the rights of persons with disabilities.

There was already legislation in place in Indonesia to deal with the rights of persons with disabilities even before the CRPD was ratified. However, the legislation in Indonesia is incompatible with the CRPD in some important respects, and these are discussed in more detail below. For example, the UN Committee on the Rights of Persons with Disabilities has stated that systems of substituted decision-making are not compatible with Article 12 of the CRPD and should be replaced with systems of supported decision-making. The Indonesian Civil Code (the "Indonesian Code"), however, provides for conservatorship which means that decision-making is handed over to someone else and this is an example of a substituted decision-making regime incompatible with the CRPD.

Another departure is that there is no equivalent guarantee under the Indonesian Code as in Article 12(4) of the CRPD which provides that all measures that relate to the exercise of legal capacity shall apply for the shortest time possible and are subject to regular review. The Indonesian Code does not clearly regulate the review of conservatorship, and only provides that it shall be terminated if the reasons for which it was put in place no longer exist, but such termination is effective only upon the court passing a judgment releasing the conservatorship.³⁵³

In implementation of the CRPD, the Ministry of Home Affairs had required every regional government to frame regulations on persons with disabilities as part of its effort to implement the protection and fulfilment of the rights of persons with disabilities to have legal security and engage with the efforts of persons with disabilities both in the process and in the enjoyment of outcomes.³⁵⁴

One of the actions that the government in Indonesia has taken following the ratification of the CRPD is the establishment of a Legal Study Centre (Pusat Kajian Hukum), one of whose functions is to provide legal aid services for persons with disabilities, which could be useful.

LAW RELATING TO PERSONS WITH DISABILITIES

The Indonesian Code provides the main legal framework for acting and making decisions on behalf of adults who lack the capacity to make particular decisions for themselves. The Indonesian Code provides that an adult who is in a "continuous state of simple-mindedness, insanity or rage" shall be placed under conservatorship (pengampuan)³⁵⁵ even though he/she may have mental capacity from time to time.³⁵⁶ The Indonesian Code only provides for conservatorship for persons with mental disabilities which could be expressed as "continuous state of simple mindedness, insanity or rage", and not for any other disability.

Identifying lack of capacity

Conservatorship is granted by a court on the request of another person. The determination of whether a person is in a continuous state of simple-mindedness, insanity or rage is based on the examination of the relevant person by an expert in psychology or another expert in mental health during the proceedings.

Thus, capacity is presumed under the law. Under Indonesian law, not all persons with disabilities are considered to have no capacity to enter into legal relationships (i.e. a contract). A person with disabilities will be considered to have no legal capacity if he/she is either under age (minor), insane or put under conservatorship.

Appointing a conservator

Under the Indonesian Code,³⁵⁷ only family members or persons who have a relationship of blood may apply for conservatorship. Who is to be appointed is determined by the relevant court that is deciding on whether the person should be placed under conservatorship. The Indonesian Code provides that, in addition to hearing other evidence, the court must also question the person being placed under conservatorship. ³⁵⁸

Regarding the process, the request to put someone under conservatorship and/or remove the conservator from his/her position shall be submitted to the local district court. The application to district court should also attach the medical statement of a competent doctor in terms of mental health, the supporting documents to determine the family relationship between the applicant and the subject of conservatorship (such as, a marriage certificate, birth certificate, family card or identity card). The panel of judges, based on the statement of claim, shall hear the testimony from relations or in-laws of the person with disabilities, and the judges will also hear the testimony of the person with disabilities.

The Indonesian Code is unclear on the legal action against the appointment of a conservator or a decision to put someone under conservatorship and only states that in the event that an appeal is submitted against a decision on conservatorship, and if there is a reason to do so, the judges may hear the testimony of the subject of conservatorship.

In recent practice, there is the case of Prof. Sudargo Gautama, who had been put under conservatorship pursuant to the district court decision based on a request from his daughter, Ms. Abigail Gautama. In this case, Prof. Sudargo Gautama submitted an appeal (*perlawanan*) against the district court decision of conservatorship that was submitted to the Supreme Court (*Mahkamah Agung*) and, pursuant to the examination by the Supreme Court, the Supreme Court annulled the decision of conservatorship based on the reason that the district court had not heard the testimony from Prof. Sudargo Gautama before deciding to put Prof. Sudargo Gautama under conservatorship.

ENTERING INTO CONTRACTS

In determining whether a person with disabilities has the capacity to manage his/her property and affairs, under Indonesian law, one would only have to determine whether the relevant person has been placed into conservatorship pursuant to the Indonesian Code as discussed above. If a court has not placed such person under conservatorship, he/she will continue to have the same rights as any other person even if he/she is has a mental or other profound disability. However, pursuant to the Indonesian Code, all acts committed as a result of simple-mindedness, insanity or rage, even if committed before a person is placed in conservatorship, may be invalidated if the grounds for seeking conservatorship existed at the time that they were committed. If a person is placed under conservatorship, he/she is deemed to have the legal status of a minor and all acts committed by such person thereafter are invalid in law.

Given the categories of simple-mindedness, insanity and rage in respect of which a conservatorship may be declared, this implies that, as far as Indonesian law is concerned, at least in all instances of a person with a physical disability, they would have the same rights as everyone else with respect to entering into contracts. However, there is no further information on what types of mental disability would fall into these categories, so it is difficult to conclude the extent to which a person with a mental disability would have the same rights. The only support system in place for assisting persons with disabilities to manage their affairs is the system of conservatorship, where the relevant person loses all their capacity. There is no system to aid and assist persons if they require help only in some circumstances or for a very limited period of time.

There is no specific guidance in relation to the taking of loans/operating of bank accounts, etc., but the principles highlighted in this paragraph would apply in these situations as well.

FAMILY

Marriage and sexual relations

A "person with disabilities" refers to mental disabilities or any other condition that leads that person to be put under conservatorship. Moreover, in terms of marriage, the conservator is able to prevent the marriage ceremony under the condition that one of the marriage candidates has been placed under conservatorship and the marriage will unquestionably cause misery to the other marriage candidate (Article 14 of Law No. 1 of 1974 on Marriage). An individual placed in conservatorship has the status of a minor under law. ³⁶⁰ A conservator may not consent to marriage on behalf of a person placed in conservatorship by reason of simple-mindedness, insanity or rage.

Parental rights

The conservator of an individual placed in conservatorship would be responsible for that individual's minor children if he/she was their sole guardian.

Discrimination (on grounds of disabilities, including mental illness)

Under Indonesian law, persons with disabilities have equal rights in every aspect of life and livelihood, and specifically rights to (among others):³⁶¹

- decent jobs and livelihood;
- equal treatment to participate in development and enjoy its results;
- accessibility in the context of independence;
- equal rights to develop talent, ability and social life; and
- the same treatment (that is, non-discriminatory treatment) in the context of employment.³⁶²

A violation of these rights against discrimination may result in sanctions against the person who does not treat the person with disabilities equally with others.³⁶³

Accessibility

The government must provide a supportive environment and accessibility for persons with disabilities.

Services

The law states that persons with disabilities have equal opportunities in all aspects of life and livelihood.³⁶⁴ In addition, from the view of Consumer Protection Law,³⁶⁵ a person with disabilities (as a consumer) has the right to be treated or serviced properly and honestly and in a non-discriminatory manner. It means that every consumer, whether or not a person with disabilities, has the right to receive proper and honest and non-discriminatory treatment or service.³⁶⁶

Insurance coverage

There is no legal obligation for insurance companies to provide special insurance coverage for persons with disabilities or to reject persons with disabilities from purchasing insurance policies.

Employment

Under Indonesian law on persons with disabilities, they have equal rights to employment, but the type and degree of their disability may be taken into account (but the same wages must be paid for the same job).³⁶⁷ There are also some special provisions for persons with disabilities in the law that provide that all companies shall employ one person with disabilities for every 100 employees.³⁶⁸

However, there is no guidance in the legislation itself on how disabilities are to be measured or categorised in order to take them into account. A government regulation elucidates the law on persons with disabilities and states that, with regard to opportunities in manpower, persons with disabilities who may do the job are those that are "physically and mentally healthy", which is to be determined through a medical certificate. The case of Wuri Handayani shows how this operates in practice. Ms Handayani was rejected when she applied for a job only because she was paraplegic, and the court held that, if a person with disabilities is otherwise healthy, they should be given an equal opportunity to be considered for a job. However, the requirement to be mentally healthy implies that persons with intellectual or psycho-social disabilities, to the extent that the examining doctor does not certify them as "mentally healthy", may be barred from employment opportunities, even though they may be able to perform to the requirement of the relevant job.

A subsequent legislation on law relating to manpower generally provides that every person who is able to work in order to produce goods and/or services either to fulfil his/her own needs or to fulfil the needs of society has the right to employment without discrimination, and this is specifically extended to persons with disabilities.³⁷¹ In addition, companies that employ persons with disabilities need to provide for their protection, for example, adequate accessibility, protective gears and suitable tools, in accordance with their needs according to their disability.³⁷²

Apart from the general sanctions applicable for discrimination against persons with disabilities, under the general law relating to manpower, there are also specific sanctions against employers for discriminating against persons with disabilities, including limitation of their business activities, suspension/cancellation of any licences, etc.³⁷³ If the companies that employ persons with disabilities do not provide facilities for their protection as mentioned above, there are also provisions for sanctions such as imprisonment and fines.³⁷⁴

Education

Educational institutions at all levels are legally obliged to give equal treatment and opportunities to persons with disabilities.³⁷⁵ The law is generally silent with regard to

requirements of providing adjustment for persons with disabilities in educational institutions. However, in terms of implementation of equal treatment at opportunities in the field of education and for the government to provide education to all citizens of Indonesia without any discrimination, the Ministry of Education and Culture has issued the Regulation of Ministry of Education No. 70 of 2009 concerning Inclusive Education for Students That Have Disorders and Having Intelligence Potency and/or Special Talent. The regulation is issued to give opportunities to all students that have disorders but still have the intelligence and potential to obtain education in accordance with the students' needs and ability in the public school that has been appointed as an inclusive school. An inclusive school is a public school that has the necessary resources to educate persons with and without disabilities. These inclusive schools are different from Extraordinary Schools (Sekolah Luar Biasa), which are established to provide education for students with disabilities/disorders in accordance with the type and degree of the disability/disorder.

Exceptions

Articles 11 and 18 of Law 4/1997 stipulate that, although every person with disabilities has the same opportunity to receive education as everyone else, they still have to adjust to the type and degree of disability they have. Not all persons with disabilities may freely choose which educational institutions they want to be admitted to-they have to be measured through the type and degree of disability to receive the appropriate level of education.

All persons of a certain age have the right to vote and persons with disabilities may not be discriminated against.

HEALTH

The law states that the treatment efforts to heal the people with mental disabilities shall be conducted by authorised medical workers and in the right place (refers to authorised medical institutions for mental disabilities care and treatment) with respect to the human rights of the person with mental disabilities,³⁷⁶ but otherwise does not elaborate on whether their consent must be obtained.

In Indonesia, any disabilities are arranged to be treated, either by the government or by private entities, with limitations and restrictions regulated under law, namely Law No. 36 of 2009 on Health. With regard to mental disabilities, the Indonesian Code regulated that a person with mental disabilities shall be put under conservatorship (if such subject is a child, then the parents will act as the guardian of the child). However, the law is silent on the method of treatment for mental disabilities; it is up to the conservator to refuse/accept the medical treatment or, in some cases, to choose their own treatment.

POLITICAL RIGHTS

Right to vote/stand for election

All persons of a certain age have the right to vote and persons with disabilities may not be discriminated against. Persons with disabilities who require assistance at the polling booths may be assisted. In relation to persons with mental disabilities, the Public Election Commission has issued a decree providing for the registration of voters in mental hospitals, nursing homes and for polling stations to be established in these places,³⁷⁷ and the patients are allowed to vote if they have recommendation letters from a psychiatrist and a doctor. A person under conservatorship may also vote as long as he/she has reached 17 years of age or is married.

In order to be able to stand for elections, persons must be physically and mentally fit, which is to be determined on the basis of a medical certificate. While physical disabilities are not counted as health problems in this context, ³⁷⁸ a person with an intellectual disability would not be able to stand for elections, unless he/she is able to obtain a certificate of being mentally fit.



SOUTH AFRICA

Report provided by: Webber Wentzel

INTRODUCTION

The South African Constitution does not define what is meant by "unsound mind", however, it is possible to be guided by case law which has developed in South Africa. This concept is discussed more fully below. The phrase may be understood as referring to an individual who is mentally and/or intellectually incapacitated to such an extent that a court deems them unable to take care of themselves and or their estate.

ENTERING INTO CONTRACTS

In South Africa, the common law makes inroads on the legal status of a person suffering from mental illness in respect of contractual capacity. In terms of the common law if a person does not, due to mental illness, understand the nature of the contract he/she is entering into, that contract is voidable for lack of capacity.³⁷⁹

The general rule in South African law is that persons are presumed legally competent to conduct their financial affairs and take care of their property unless the contrary is proved.

The use of reason is said to be the principal requirement for taking part in legal and commercial transactions as an individual's capacity to enter into and understand legal transactions is very closely related to a person's mental condition. For his/her own protection, therefore, South African law precludes a person from entering into legal contracts independently if he/she is mentally so constrained that he/she cannot understand the nature, purport and consequences of his/her action, (referred to by the courts and legislation as being of "unsound mind").

As a starting point, there is, however, a rebuttable presumption in South African law that everyone is capable of contracting. It would be for an individual alleging that someone did not have capacity to contract to prove this in a court of law should they wish to invalidate a contract entered into by a mentally and or intellectually disabled individual. This is generally done through expert evidence such as the evidence of psychologists and psychiatrists.

Lange v Lange and Uys v Uys have held that the fact that a person has been declared mentally ill and a curator has been appointed to him/her does not, as such, affect his/her capacity to act. The important question one is required to look at is whether the person was in fact mentally ill when the transaction was entered into. If the person was mentally ill, one then has to look at the extent (if any) to which the individual concerned did not at the time understand the nature and obligations of the contract being entered into.

A court of law called upon to decide a question of contractual liability depending upon mental capacity must determine whether the person concerned was or was not at the time capable of managing the particular affair in question, that is to say, whether his/her mind

nature and obligations of the contract entered into at the time of entering into such contract, the contract is voidable at the instance of the court.

In terms of rule 57 of the Uniform Rules of Court, a person may apply to the High Court for an order declaring another person (the patient) "to be of unsound mind and as such incapable of managing his affairs". Such application is usually made by a member of the patient's family. The application to the High Court must be supported by affidavits of two medical practitioners. The nature, possible duration and reasons why the patient is unable to manage his/her affairs should be stated in full. The practitioners should state that they have no interest in the order sought, and should be unrelated to the patient.

Furthermore, in terms of the Mental Health Care Act, 17 of 2002 ("**MHCA**"), any person over the age of 18 may apply to a Master of a High Court for the appointment of an administrator for a mentally ill person or person with severe or profound intellectual disability.³⁸¹ The application must contain considerable detail, including all available mental health-related medical reports relevant to the mental health status of that person and to his/her incapability to manage his or her property (Section 60(2)).

The MHCA recognises that some individuals may be incapable of managing their personal property or possessions, including their finances.

Section 59 of the MHCA states that the Master of the High Court may appoint an administrator to care for and administer the property of a mentally ill person or person with severe or profound intellectual disability on consideration and processing of an application.

In terms of Section 63 of the MHCA, an administrator has powers and functions to take care of and administer the property of the person for whom he/she is appointed and perform all functions incidental thereto; and to carry on any business or undertaking of that person subject to any other law. An administrator is not entitled to alienate or mortgage any immovable property of the person for whom he/she is appointed unless authorised to do so by a court order or with the consent of the Master of the High Court.

In terms of Section 63(3), the powers of an administrator are to:

- take care of and administer the property of the person for whom he/she is appointed and perform all functions incidental thereto: and
- carry on any business or undertaking of that person subject to any other law.

FAMILY

Marriage

As marriage is an agreement based on the consensus of the parties to it, both parties must be capable of making an effective declaration of will. In terms of South African common law, a person who is unable, owing to mental and or intellectual disability, to understand the nature of the juristic act of entering into a marriage and to appreciate the duties and responsibilities marriage creates, or who is motivated or influenced by delusions caused by mental illness, cannot therefore enter into a valid marriage. This incapacity cannot be cured by the consent of a curator who may have been appointed to the person in question, nor may such a curator act on the person's behalf.³⁸²

Incapacity of will is a question of fact, depending on the circumstances of the particular case. Under South African law, a mentally and or intellectually ill person is therefore capable of entering into a perfectly valid marriage during a lucid interval. Equally, a person who has been declared incapable of managing his/her own affairs on account of mental or intellectual incapacity may also enter into a valid marriage if he/she is at the relevant time capable of understanding the nature of marriage and the responsibilities it creates. As in the law of contract, the normal rule is that everyone is presumed to be capable until the contrary is proved.

Abortion

In South Africa, abortion is authorised in certain circumstances. The Choice on Termination of Pregnancy Act 92 of 1996 makes provision for certain cases where an abortion may be performed. In the case where a woman is severely mentally disabled to such an extent that she is completely incapable of understanding and appreciating the nature or consequences of a termination of her pregnancy, her pregnancy may be terminated during the first 12 weeks of the gestation period, or from the 13th up to and including the 20th week of the gestation period if a medical practitioner, after consulting with the pregnant woman, is of the opinion that the continued pregnancy would pose a risk of injury to the woman's physical or mental health or there exists a substantial risk that the foetus would suffer from a severe physical or mental abnormality, upon the request of and with the consent of her natural guardian, spouse or legal guardian, as the case may be, or, if such persons cannot be found, upon the request and with the consent of her curator personae.³⁸³

Consent to sexual relations

Section 57 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 makes it an offence to have sexual intercourse with someone who is mentally disabled. This section only applies to persons who are mentally disabled as defined in the Act.

Section 1 of the Act defines a person who is mentally disabled as a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he/she, at the time of the alleged commission of the offence in question, was:

- unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- unable to resist the commission of any such act; or
- unable to communicate his/her unwillingness to participate in any such act.

Some individuals may have a mental or intellectual disability but still be able to understand the nature and outcomes of a sexual act and would therefore still decide to consent to sexual acts. It is respected that persons with mental disabilities may and do consent to sexual activity.

Adoption

In terms of Section 231(2)(a) of the Children's Act, a prospective adoptive parent must be fit and proper to be entrusted with full parental responsibilities and rights in respect of the child and assessed by an adoptive social worker.

The Children's Act accordingly does not automatically bar mentally or intellectually disabled individuals from adopting. The individual would, however, have to meet the requirements of Section 231(2) by showing that they are fit and proper.

Taking children into care

In terms of the Children's Act, the starting point under South African law is that the biological mother of a child has full parental responsibilities and rights in respect of a child.³⁸⁴ The biological father of a child acquires parental rights and responsibilities if he is married to the mother of the child at the time of birth and or conception/pregnancy.³⁸⁵ This is the case regardless of one's mental and or intellectual capacity.

However, an application to the High Court may be made in terms of Section 28 of the Children's Act for the termination, extension, suspension or restriction of parental responsibilities and rights. In terms of Section 28(3), when considering such an application, the court must take into account factors such as the best interests of the child and any other fact that should, in the opinion of the court, be taken into account. Section 28 makes no mention of a parent's mental capacity and/or disability as a consideration; arguably, however, in some circumstances, a parent's disability may be considered insofar as is necessary and in the best interests of the minor child concerned.

DISCRIMINATION

Discrimination is directly dealt with in the equality clause contained in Section 9 of the Constitution. Everybody is equal before the law and has the right to equal protection and benefit of the law. Neither the state nor any person may unfairly discriminate directly or indirectly against anyone on the ground of disability. Section 9 further allows for a form of substantive equality in so far as it allows for affirmative action in respect of "designated groups" which includes persons with disabilities. Section 9(2) makes provision for affirmative action in that it provides that in order to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

Section 9 may be utilised in courts in instances where an individual is of the opinion that he/she has been directly or indirectly discriminated against both in the public and private sector on grounds of his/her disability. Section 9 further states that "national legislation must be enacted to prevent or prohibit unfair discrimination". In order to further this requirement, the legislator has enacted the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 ("PEPUDA").

Section 1 of PEPUDA defines "discrimination" as any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly imposes burdens, obligations or disadvantages on; or withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds. Disability is a prohibited ground.

Section 9 of PEPUDA specifically provides that no person may unfairly discriminate against any person on the ground of disability, including denying or removing from any person who has a disability any supporting or enabling facility necessary for functioning in society and failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.

PEPUDA makes it the duty and responsibility of the state to promote and achieve equality, while all persons (which would include juristic persons) have a duty and responsibility to promote equality.³⁸⁶

PEPUDA provides for the establishment of equality courts in all magisterial districts, which in principle should provide easy access to persons who believe they have been discriminated against on the basis of, among other factors, disability.

In terms of Section 21(1), the equality court before which proceedings are instituted in terms of or under PEPUDA must hold an inquiry in the prescribed manner and determine whether unfair discrimination has taken place, as alleged. PEPUDA can accordingly be utilised where there are discriminatory practices which take place on grounds of mental and or intellectual disability, including mental illness in both the public and private sphere.

The MHCA also contains provisions aimed at protecting mental healthcare users. Section 8(1) of the Mental Health Care Act provides that "the person, human dignity and privacy of every mental health care user must be respected."

Section 9(1) goes on to require that a mental healthcare user may not be unfairly discriminated against on the grounds of his/her mental health status.

In order to ensure that mental healthcare users are not discriminated against, Section 8 requires that every mental healthcare user receive care, treatment and rehabilitation services according to standards equivalent to those applicable to any other healthcare user.

In the employment sphere, the Employment Equity Act ("**EEA**") has been enacted with the aim of promoting the constitutional right of equality within the work space. It also aims to eliminate unfair discrimination in employment and to ensure the implementation of employment equity to redress the effects of discrimination.

The EEA has the very important purpose of achieving equity in the workplace. It attempts to do so, first, by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination and, second, by implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce. Persons with disabilities are included within the definition of "designated groups" in the EEA.

Section 6 of the EEA provides that no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more ground, including disability.

ACCESS TO JUSTICE

In South Africa, access to justice for persons with disabilities has received very limited attention, particularly in respect of individuals who are psychologically and or intellectually disabled. Recently, there have been attempts by the South African government aimed at providing access to justice for people with physical disabilities and to a lesser extent those with visual and hearing disabilities. The developments in this regard have, however, been very slow and unequal when one compares the various courts and various disabilities. There has further been scant attention given to the needs of people with intellectual and mental disabilities.

Section 9 of PEPUDA, stipulates that a lack of accessibility for persons with disabilities constitutes unfair discrimination. Section 9(c) further provides that failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons constitutes unfair discrimination.

In terms of South African law and the uniform rules of court, a person who is unable to appreciate the nature of legal proceedings owing to mental disorder (used interchangeably by the South African courts with the words unsound mind and mental incapacity) requires a curator ad litem to assist him/her.³⁸⁷ A curator ad litem is a person who conducts court proceedings on behalf of another. It is important to note, however, that this is not automatic and that every person is presumed to be sane and able to conduct their own legal proceedings and the onus is on a person alleging the contrary to prove it. South African courts have held that to have a curator appointed to a person without full justification constitutes a serious violation of that person's dignity and status.³⁸⁸ In order to succeed in showing that an individual is of unsound mind and consequently requires a curator ad litem, an applicant has to establish that the individual in question's mental or intellectual condition is of such a nature that he/she is unable to understand the nature or effect of the legal proceedings at hand. Expert evidence is generally required in this regard.

In the criminal realm, there has been further legislation enacted with the object of protecting accused individuals who are mentally and or intellectually disabled.

HEALTH

Section 9 of the MHCA deals with consent to care, treatment and rehabilitation services and admission to health establishments by mental healthcare users. A healthcare provider or a health establishment may provide care, treatment and rehabilitation services to or admit a mental healthcare user only if:

- the user has consented to the care, treatment and rehabilitation services or to admission;
- authorised by a court order or a Review Board; or
- due to mental illness, any delay in providing care, treatment and rehabilitation services or admission may result in the
 - death or irreversible harm to the health of the user;
 - user inflicting serious harm on him/herself or others; or
 - user causing serious damage to or loss property belonging to him/her or others.

Any person or health establishment that provides care, treatment and rehabilitation services to a mental healthcare user or admits the user in circumstances referred to in Subsection (1) (c) is mandated to follow specific steps which have been provided by the legislature in order to protect patients such as the following:

- report this fact in writing to the relevant Review Board; and
- they may not continue to provide care, treatment and rehabilitation services to the user concerned for longer than 24 hours unless an application in terms of the MHCA is made within the 24 hour period to do so.

Section 33 of the MHCA found under Chapter V allows for the involuntary care, treatment and rehabilitation of an individual in certain circumstances.

An application for involuntary care, treatment and rehabilitation services may be made only by the spouse, next of kin, partner, associate, parent or guardian of a mental healthcare user. If the other persons named are unwilling, incapable or not available, a healthcare user may apply. The MHCA prescribes formalities for such an application.

The head of a health establishment may approve the application only if two mental healthcare practitioners agree that conditions for involuntary care treatment and rehabilitation exist.

The following must be established:

- he/she is likely to inflict serious harm to him/herself or others;
- care, treatment and rehabilitation of the user are necessary for the protection of the financial interests or reputation of the user; or
- the user is incapable of making an informed decision on the need for the care, treatment and rehabilitation and is unwilling to receive the required care, treatment and rehabilitation (Section 33(5)(a) read with section 32).

Afterwards, a 72-hour assessment takes place as provided for in Section 34 of the MHCA. The patient must be detained and cared for, treated and rehabilitated in a psychiatric hospital until a Review Board makes its decision as to whether to grant the application for involuntary care, treatment and rehabilitation. The Review Board is an independent body with specialist knowledge.

The patient has a right to be represented, including by a legal representative at the hearing before the Review Board.³⁸⁹ The Review Board must deliver its decision within 30 days of receipt of the documents. If the Board decides to grant the request, it must submit to the Registrar of the High Court the documents and a written notice for consideration by a High Court.

The High Court must consider the Review Board's request within 30 days of receiving the documents. Thereafter, the High Court must order either the further hospitalisation or the immediate discharge of the patient.

Once a patient is hospitalised, the MHCA provides for periodical reports on patients to be sent to the Review Board, in an attempt to protect patients. If a patient recovers, he/she can be treated as a voluntary patient, if he/she is willing to be so treated. Alternatively, the head of the establishment must immediately cause the patient to be discharged.

Consent to treatment and operations for illness other than mental illness

Regulation 37 of the Regulations to the MHCA regulates circumstances where treatment and/or an operation is required for illness other than mental illness. In terms of Regulation 37(1) an involuntary mental healthcare user, an assisted mental healthcare user, a state patient or a mentally ill prisoner who is capable of consenting to treatment or an operation, must decide on his/her own whether to have treatment or an operation or not.

Regulation 37(2), however, provides for circumstances where a mental healthcare practitioner deems a user to be incapable of consenting to treatment or an operation, due to mental illness or intellectual disability. In such circumstances, a curator (if a court has appointed one), a spouse, next of kin, a parent or guardian, a child over the age of 18, a brother or sister, or a partner or associate may consent to the treatment or operation.

Where none of the persons referred to in sub-regulation (2) is available and attempts have been made to locate them and this has been confirmed in writing, the head of the health establishment where the mental healthcare user resides may only grant consent to treatment or an operation if:

- the relevant alternatives have been discussed with the head of the health establishment concerned and such head is satisfied that the most appropriate intervention is to be performed; and
- the medical practitioner who is going to perform such operation recommends the treatment or operation.

POLITICAL RIGHTS

Right to vote

In South Africa, a person who has been declared by a court as mentally incapacitated and accordingly unable to take care of him/herself or property or who has been detained or admitted to a healthcare establishment in terms of the MHCA may not be registered as a voter and is not permitted to vote.³⁹⁰

Right to stand for elections

The Constitution of the Republic of South Africa, Act 108 of 1996 (the "Constitution") provides that every adult citizen has the right to stand for public office and, if elected, to hold office. Sections 47 and 106 of the Constitution, which deal with the membership of the Provincial Legislature and National Assembly, prohibit anyone "declared to be of unsound mind" by a South African court from being a member of the Provincial Legislature and National Assembly. The Constitution does not define what is meant by "unsound mind" in this context; however, it is possible to be guided by case law which has developed in South Africa. The phrase may be understood as referring to an individual who is mentally and or intellectually incapacitated to such an extent that a court deems them unable to take care of themselves and/or their estate.

ENDNOTES



- For further information on the CRPD's provisions, please see the summary of key points in the section below.
- ² Equality Act 2010 and the Equality Act 2010: Code of Practice.
- Burnip v Birmingham City Council [2012] EWCA Civ 629; Equality and Human Rights Commission Guide: The United Nations Convention on the Rights of People with Disabilities.
- Equality and Human Rights Commission Guide: The United Nations Convention on the Rights of People with Disabilities.
- The Mental Disability Advocacy Centre, Submissions to the House of Lords Select Committee on the Mental Capacity Act 2005, September 2013.
- 6 Mental Capacity Act 2005, section 1(1).
- Mental Capacity Act 2005, section 2(4).
- 8 Mental Capacity Act 2005, section 3(1)(d).
- ⁹ Mental Capacity Act 2005: Code of Practice.
- RB v Brighton & Hove City Council [2014] EWCA Civ 561; CC v KK and STCC COP 12041541.
- 11 LBL v RJY and VJ COP 11829637.
- Mental Capacity Act 2005, section 27.
- ¹³ Mental Capacity Act 2005, section 27.
- London Borough of Havering v LD [2010] EWCOP 3876.
- Mental Capacity Act 2005, section 50(1)(a).
- Mental Capacity Act 2005, section 3.
- Mental Capacity Act 2005, section 15.
- ¹⁸ Mental Capacity Act 2005, section 57.
- ¹⁹ Masterman-Lister v Jewell [2002] EWCA Civ 1889.
- ²⁰ Re Clarke [2012] EWCOP 2256.
- W v Office of the Public Guardian [2010] G.W.D. 27-560.

- Office of Fair Trading, Guidance to Creditors, September 2011, page 6.
- Office of Fair Trading, Guidance to Creditors, September 2011, page 6.
- A Local Authority v TZ [2013] EWHC 2322 (COP).
- ²⁵ A v M [2013] EWHC 4020 (COP).
- An NHS Trust v DE [2013] EWHC 2562 (Fam).
- In Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33.
- Kutzner v Germany Application no 46544/99 (2002).
- ²⁹ An NHS Trust v D [2003] EWHC 2793 (Fam).
- Equality Act 2010.
- Mental Capacity Act 2005, section 2(1).
- Mental Capacity Act 2005, section 2(1).
- ³³ Re RGS [2012] EWHC 4162 (COP).
- R v West London Youth Court [2005] EWHC 2583.
- ³⁵ C v Sevenoaks Youth Court [2009] EWHC (Admin).
- Kedzior v Poland Application No. 45026/07 (2012).
- Shtukaturov v Russia Application No. 44009/05 (2008).
- Mental Health Act 1983 and the Mental Health Act 1983: Code of Practice.
- Liberty, Submission to the House of Lords Select Committee on the Mental Capacity Act 2005, August 2013.
- Mental Health Act 1983: Code of Practice.
- Mental Capacity Act 2005 and the Mental Capacity Act 2005: Code of Practice.
- In the matter of LDV [2013] EWHC 272 (Fam).
- Herczegfalvy v Austria Application No 10533/83.
- Varbanov v Bulgaria Application No 31365/96 (2000).
- Office for Disability Issues, Initial Report to the UN Committee on the Rights of Persons with Disabilities, May 2011.
- ⁴⁶ Alajos Kiss v Hungary Application No 38831/06.

- ⁴⁷ Article 425 of the Civil Code.
- Report no. 163 of the Senate issued in the name of the commission on foreign relations, defence and the armed forces, on the draft law adopted by the National Assembly, authorising the ratification of the CRPD.
- Law dated 5 March 2007 for the reform of the legal protection of adults, implemented by the Charter of Rights and Freedoms of Protected Persons of 31 December 2008.
- Article 415 of the Civil Code and Article 1 of the Charter of Rights and Freedom of Protected Persons.
- Article 459-2 of the Civil Code.
- Under judicial safeguard, no curator or tutor is appointed, the person with disabilities has full capacity but the judge may rescind certain contracts if they are prejudicial to that person's interests. It is often a preliminary step taken before curatorship.
- Article 430 of the Civil Code.
- Article 425 of the Civil Code.
- Article 431 of the Civil Code.
- Article 433 of the Civil Code.
- Article 440 of the Civil Code.
- 58 Article 440 of the Civil Code.
- 59 Article 430 of the Civil Code.
- 60 Article 434 of the Civil Code.
- Article 432 of the Civil Code.
- ⁶² Article 449 of the Civil Code.
- ⁶³ Article 428 of the Civil Code.
- Article 435 of the Civil Code.
- ⁶⁵ Article 437 of the Civil Code.
- 66 Article 467 of the Civil Code.
- 67 Article 471 of the Civil Code.

- Article 472 of the Civil Code.
- 69 Article 473 of the Civil Code.
- Article 473 of the Civil Code.
- Article 416 of the Civil Code.
- Article 439 of the Civil Code.
- Articles 441 and 442 of the Civil Code.
- Article 430 of the Civil Code.
- Article 1239 of the Code of Civil Procedure.
- Law no. 2007-308 dated 5 March 2007 for the reform of the legal protection of adults, as modified.
- Decree no. 2008-1484 dated 22 December 2008 relating to the management of the estate of persons under curatorship or tutorship implementing Articles 452, 496 and 502 of the Civil Code.
- Article 468 of the Civil Code.
- ⁷⁹ Article 470 of the Civil Code.
- Article 1399 of the Civil Code.
- Article 460 of the Civil Code as amended on 5 March 2007 and in force since 1 January 2009.
- 82 RTD civ 1998 658 obs Hauser.
- Article 515-1 merely provides that a civil partnership agreement may be entered into by two individuals of age, of the same sex or of different sex to organise their life in common.
- Articles 1118 and 1304 of the Civil Code.
- ⁸⁵ Article 461 of the Civil Code.
- A joint declaration means the declaration of both partners in a civil partnership agreement.
- Article 515-3 para 1 of the Civil Code.
- 88 Article 462 of the Civil Code.
- ⁸⁹ Article 249 para 2 of the Civil Code.

- 90 Article 249 para 1 of the Civil Code.
- 91 Article 249-2 of the Civil Code.
- 92 Article 223-10 of the French Criminal Code.
- 93 Article 16-3 of the Civil Code.
- 94 Article 2123-2 of the French Public Health Code.
- ⁹⁵ L224-4 of the French Social Action and Family Code.
- ⁹⁶ Cass. Civ. 8 Oct 2008.
- 97 Article 458 of the Civil Code.
- 98 Article 458 of the Civil Code.
- 99 Article 373 of the Civil Code.
- 100 Article 390 of the Civil Code.
- 101 Article 380 of the Civil Code.
- 102 Article 507-1 of the Civil Code.
- ¹⁰³ Article 1094-1 of the Civil Code.
- 104 Article 1075 of the Civil Code.
- 105 Articles 1040 and 1057 of the Civil Code.
- Articles 2011 and 2030 of the Civil Code.
- L323-1 et seg. of the Labour Code.
- For the private sector: Articles 1132-1 and 1133-3 of the Labour Code; for public administration; Law no. 83-634 of 13 July 1983 on rights and obligations of civil servants.
- 109 Articles L1134-1 and following of the Labour Code.
- Article 6 of Law no. 83-634 of 13 July 1983 on rights and obligations of civil servants.
- Article L5213-6 and following of the Labour Code.
- Decision of the Conseil d'Etat (highest administrative court in France) dated 14 November 2008.
- Article L323-8-6-1 of the Labour Code.

- Disability Plan 2013/2015 of the Ministry of Defence.
- 115 Article L112-1 of the Education Code.
- 116 Charter University/Disability dated 4 May 2012.
- Article L123-4-2 of the Education Code created by Law no. 2013-660 of 22 July 2013 on Higher Education and Research.
- 118 Article L112-1 of the Education Code.
- Articles D351-27 et seq. of the Education Code and Circulaire of 27 December 2011 relating to the organisation of exams in higher education (reference no. ME NE1132911C).
- Article 468 paragraph 3 of the Civil Code.
- Article 471 of the Civil Code.
- Article 475 of the Civil Code.
- 123 Article 475 of the Civil Code.
- 124 Article 467 para 3 of the Civil Code.
- 125 Article 706-113 of the Criminal Procedure Code.
- 126 Article L-1111-4 of the Public Health Code.
- 127 Article 459 of the Civil Code.
- Article L3211-1 of the Public Health Code.
- 129 Article L312-1 of the Public Health Code.
- Article L3211-3 of the Public Health Code.
- "Accompanying persons with disabilities towards health" published by the National Agency for the assessment and quality of social and medico-social establishments and services dated July 2013.
- Circulaire of 26 June 2013 regarding general standards of physical and mental fitness for the army military division.
- Order dated 20 December 2012 regarding determination and the control of medical calability of the military members.
- Note that, when the judge makes or renews a tutorship decision, the judge may rule on whether the person under tutorship may keep his/her right to vote but a person under tutorship does not automatically lose the right to vote.
- Article L57-1 of the Electoral Code.

- Article L62-2 of the Electoral Code.
- 137 Article L200 of the Electoral Code.
- Report on the Pelletier Act concerning the right to vote for people with disabilities, written by Christian Bonnet (French Senator), 10 November 1999.
- Secs. 104, 1896 German Civil Code (Bürgerliches Gesetzbuch; "BGB") and the German Constitutional Act (Grundgesetz; "GG").
- ¹⁴⁰ Sec. 104 no. 2 BGB.
- ¹⁴¹ Sec. 105 BGB.
- ¹⁴² Sec. 131 para 1 BGB.
- ¹⁴³ Sec. 1896 para 1 BGB.
- ¹⁴⁴ Sec. 1896 para 1a BGB.
- ¹⁴⁵ Sec. 1896 para 2 BGB.
- ¹⁴⁶ Sec. 1897 para 4 BGB.
- ¹⁴⁷ Sec. 1897 para 5 BGB.
- ¹⁴⁸ Sec. 179 BGB.
- ¹⁴⁹ Sec. 1903 para. 1 BGB.
- Sec. 1896 para 1 sentence 1 BGB.
- Sec. 271 et seq. of the Law on Procedure in Family Affairs and in Matters pertaining to Voluntary Jurisdiction (Familiengesetz; "FamG").
- Sec. 278 para 1 sentence 1 FamG.
- ¹⁵³ Sec. 278 para 2 FamG.
- ¹⁵⁴ Sec. 280 FamG.
- ¹⁵⁵ Sec. 294 para 3 FamG.
- Federal Court of Justice (Bundesgerichtshof; "BGH"), resolution of 9 February 2011 in case XII ZB 526/10 and resolution of 14 March 2012 in case XII ZB 502/11.
- ¹⁵⁷ Sec. 1902 BGB.
- ¹⁵⁸ Sec. 105 BGB.
- ¹⁵⁹ Sec. 105a BGB

- Article 6 GG.
- ¹⁶¹ Sec. 1304 BGB.
- ¹⁶² Sec. 1903 para 2, BGB.
- In two judgments the German Federal Court of Justice confirmed the possibility of persons with disabilities in social need being able to inherit without such inheritance cancelling out social welfare.
- ¹⁶⁴ Sec. 2229 para. 4 BGB.
- ¹⁶⁵ Sec. 1905 BGB.
- Art. 3 para 3 sentence 2 GG.
- German Constitutional Court; decision dated 28 March 2000 in case 1 BvR 1460//99.
- The number of monthly work places is determined by taking the average number of work places of every month, adding these numbers and dividing the sum by 12.
- Sec. 71 et seq. of the German Social Security Code IX (Sozialgesetzbuch IX; "SGB IX").
- ¹⁷⁰ Sec. 77 SGB IX.
- ¹⁷¹ Sec. 77 SGB IX.
- Sec. 1 of the General Equal Treatment Act (Allgmeines Gleichbehandlungsgesetz; "AGG").
- ¹⁷³ Sec. 7 AGG.
- ¹⁷⁴ Sec. 3 AGG.
- ¹⁷⁵ Sec. 15 AGG.
- ¹⁷⁶ Sec. 22 AGG.
- ¹⁷⁷ Sec. 8 AGG.
- ¹⁷⁸ Sec. 81 para 4 SGB IX.
- ¹⁷⁹ Sec. 81, para 5 SGB IX.
- Sec. 85 et seq. SGB IX.
- ¹⁸¹ Sec. 90 SGB IX.
- ¹⁸² Secs. 2 and 68 SGB IX.

- Sec 89 para 2 SGB IX.
- Sec. 91 para 3 SGB IX.
- German Federal Labour Court, judgment of 16 February 2012 in case 6 AZR 553/10.
- Sec. 62 para 1 no.1 of the Code of Administrative Court Procedure (Verwaltungs gerichtsordnung "VwGO").
- Sec. 827 sentence 1 BGB.
- Sec. 276 para 1 sentence 2 BGB.
- Sec. 20 of the German Criminal Code (Strafgesetzbuch "StGB").
- ¹⁹⁰ Sec. 21 StGB.
- ¹⁹¹ Sec. 63 StGB.
- Sec. 170 para 1 of the German Code of Criminal Procedure (Strafprozessordnung "StPO").
- ¹⁹³ Sec. 413 StPO.
- ¹⁹⁴ Sec. 67 StGB.
- ¹⁹⁵ Section 1904 BGB.
- Section 13 no. 2 of the German Federal Election Act (Bundeswahlgesetz "BWahlG").
- Sec. 8 no. 2 of the Local Election Act North Rhine-Westphalia.
- Sec 6 para 1 no.2 German European Election Act (Europawahlgesetz).
- ¹⁹⁹ Secs. 71 and 139 SGB IX.
- ²⁰⁰ Law no. 104/1999.
- ²⁰¹ Law no. 18/2009.
- Presidential Decree of 04/10/2013.
- Law no. 104/1992.
- Italian Civil Code, Articles 414-432.
- Italian Civil Code, Articles 404-413.

- See D.L.V. vs Procuratore Generale della Repubblica presso la Corte d'Appello di Roma (Italian Supreme Court, First Section (Civil), no. 4866 of 01/03/2010) and P.G. and P.I. vs P.L., P.A.M and P.R (Italian Supreme Court, First Section (Civil), no. 18320 of 25/10/2012).
- ²⁰⁷ Italian Civil Code, Article 1722.
- ²⁰⁸ Italian Civil Code, Articles 428 and 1425.
- De. Ca Si c. Pi. & Pa. s.r.l, Court of Rome, Third Section, 18/02/2013.
- ²¹⁰ Italian Civil Code, Article 1626.
- ²¹¹ Italian Civil Code, Article 1833.
- Italian Constitution, Articles 3, 29, 30 and 31.
- ²¹³ Italian Civil Code. Articles 471, 472, 489, 591, 596 and 700.
- Rizzo vs Martellozzo, Italian Supreme Court, ruling no. 5620 of 22/05/1995.
- Law no. 184/1983.
- Peloso vs. Frizzarin, Court of Appeal of Milan, Judicial Decree no. 46 of 07/05/2012.
- Italian Civil Code, Articles 85, 119 and 120.
- ²¹⁸ Protective Custody Judge at the Court of Rome, 10/03/2009.
- T.G.N. Italian Supreme Court Third Section (Criminal), no. 36896 of 13/03/2013.
- Legislative decree no. 216/2003, Law no. 67/2006, Legislative decree no. 150/2013.
- ²²¹ Law no. 67/2006.
- Legislative decree no. 213/2003.
- Law no. 68/1999 and Law no. 92/2012.
- Court of Milan (Employment Section), Ruling of 11/02/2013.
- Italian Civil Procedure Code, Articles 75 and 78.
- Prime Ministerial Decree of 21/06/2007.
- ²²⁷ Law no. 127/1997, Article 16.
- Italian Civil Code, Article 384.

- Court of Reggio Calabria, 12/07/1999.
- Eluana Englaro, Supreme Court, 2007, no. 21748.
- ²³¹ Court of Modena, 05/11/2008.
- Law no. 194/1978.
- ²³³ Law no. 180/1978.
- Italian Constitution, Article 51.
- ²³⁵ Constitutional Court Ruling 303/1987.
- ²³⁶ 2013 campaign by AIPD (Associazione Italiana Persone Down) and the Local Health Agency of Rome.
- Act of 1 August 19997 Rights of Disabled Persons Chart.
- Act of 15 June 2012 The ratification of the Convention on the Rights of Persons with Disabilities.
- The Statement of the Government of 25 September 2012 on the binding force of the CRPD.
- Article 12, Act of 25 February 1964 Family and Guardianship.
- Article 114, Act of 25 February 1964 Family and Guardianship.
- Act 1 of 1 August 19997 Rights of Disabled Persons Chart.
- Act of 27 August 1997 Professional and Social Rehabilitation and Employment of Persons with Disabilities.
- Act of 7 September 1991 Education System Act.
- Act of 25 June 2010 Sports Act.
- Act of 5 January 2011 Elections Code.
- Article 4 of the General Law of people with disabilities' rights and social inclusion, approved by the Royal Legislative Decree 1/2013, of 29 November.
- Legal Capacity and Disabilities. Proposal for Adaptation of the Spanish Legal System to article 12 of CRPD (April 2012) by the Spanish human rights institute "Bartolomé de las Casas".
- Supreme Court, judgment 282/2009 of 29 April 2009.
- General Law of people with disabilities' rights and social inclusion. Royal Legislative Decree 1/2013, of 29 November.
- ²⁵¹ Spanish Civil Code.

- Cyclical disorders are considered persistent for this purpose.
- Protected under Article 10 of the Spanish Constitution.
- Spanish Procedure Civil Law.
- 255 Spanish Civil Code.
- Law on Protection of People with Disabilities Estate and amendment of the Civil Code, the Civil Procedure Law and the Tax Regulations for this purpose. Law 41/2003 of 18 November.
- Spanish Civil Code.
- Workers Statute. Royal Legislative Decree 1/1995, of 24 March.
- Insurance Contract Law. Law 50/1980, of 8 October.
- Spanish Civil Code.
- Spanish Civil Code.
- Spanish Criminal Code. Organic Law 10/1995 of 23 November.
- Spanish Civil Code.
- Sexual and reproductive health and voluntary pregnancy interruption. Organic Law 2/2010, of 3 March.
- General law of people with disabilities' rights and social inclusion. Royal Legislative Decree 1/2013, of 29 November.
- Education Organic Law. Organic Law 2/2006, of 3 May.
- Report on the Impact of the CRPD on Spanish educational legislation by CERMI (The Spanish Committee of Representatives of Persons with Disabilities), a non-governmental organisation.
- Royal Decree 1892/2008, of 14 November, regulating the conditions of access to an official university degree and the admission procedures to Spanish public universities.
- General law of people with disabilities' rights and social inclusion. Royal Legislative Decree 1/2013, of 29 November.
- Basic Statute of Public Employees. Law 7/2007 of 12 April.
- Spanish Procedure Civil Law.
- Law on Legal Aid. Law 1/1996, of 10 January.

- ²⁷³ Spanish Civil Code.
- Basic Law on patient autonomy and rights and obligations of clinical information and documentation. Law 41/2002, of 14 November.
- Spanish Procedure Civil Law.
- Law on Medical Research. Law 14/2007, of 3 July.
- Spanish Criminal Code. Organic Law 10/1995 of 23 November.
- General Electoral Law. Organic Law 5/1985, of 19 June.
- ORDER PRE/2622/2007, of 7 September, approving medical requirements for entering into military schools.
- Law 22.431 on "Comprehensive Disability Protection".
- ²⁸¹ Article 75
- ²⁸² Law 26.378
- Known as ADAJUS
- Please note that the new Civil and Commercial Code will be implemented on August 1st, 2015.
- ²⁸⁵ Argentine Civil Code (article 152 bis).
- Section 141 of the Argentine Civil Code.
- Unique Disability Certificate (UDC) National Service for Rehabilitation (SNR), under the jurisdiction of the National Ministry of Health.
- ²⁸⁸ Argentine Civil Code (article 152 bis).
- ²⁸⁹ Article 32 CCC.
- 290 Article 152 bis.
- National Civil Court of Appeal, Sala B 19/03/1993 "Lepoole, Raúl G.".
- Section 141 of the Argentine Civil Code.
- ²⁹³ Article 405 CCC.
- Argentine Civil Code (article 2087). Usufruct is the real right to use and enjoy a thing whose ownership belongs to another, provided its substance is not altered.
- ²⁹⁵ Argentine Penal Code Law 11.179.

- Referred to in Sections 5, 11 and 12 (first paragraph) of the Convention on the Elim ination of All Forms of Discrimination Against Women.
- ²⁹⁷ National Civil Court of Appeal, Sala J 12.05.2011 "G., N. T. y C., A. E.".
- ²⁹⁸ Argentine Civil Code (article 152 bis).
- ²⁹⁹ Law 25.689.
- Disabled Comprehensive Protection System Law 25.504.
- Vehicles for disabled Law 19.279.
- Basic System for Authorisation and Rehabilitation for people with disabilities Law 24.901 (article 17).
- Basic System for Authorisation and Rehabilitation for people with disabilities Law 24.901 (article 24).
- Basic System for Authorisation and Rehabilitation for people with disabilities Law 24.901 (article 32).
- Communication "A" 5460 BCRA (article 2.2).
- Article 152 bis.
- National Civil Court of Appeal, Sala C 08/08/2013 "S., A. s/ insanity" (AR/JUR/52780/2013).
- ³⁰⁸ CRPD Law 26.378 (article 13).
- Comprehensive protection system for the disabled Law 22.431.
- Disabled Comprehensive Protection System Law 25.504.
- National Electoral Code Decree No. 2135 / Comprehensive system for the protection of disabled Law 22.431.
- National Electoral Code Decree N° 2135 (article 3).
- Decree No. 3,298/1999 that regulates Federal Law No. 7,853/1989, which implements the National Policy for the Inclusion of persons with disabilities, consolidates the protection rules and other provisions.
- Decree no. 6949/2009.
- http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm
- http://www.planalto.gov.br/ccivil_03/leis/l7853.htm
- http://www.planalto.gov.br/ccivil_03/leis/l8112cons.htm

- http://www.planalto.gov.br/ccivil_03/leis/l8213cons.htm
- http://www.planalto.gov.br/ccivil 03/leis/l8742.htm
- http://www.planalto.gov.br/ccivil_03/decreto/d3298.htm
- http://www.planalto.gov.br/ccivil 03/leis/l10048.htm
- http://www.planalto.gov.br/ccivil_03/leis/l10098.htm
- http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2004/decreto/d5296.htm
- http://www.planalto.gov.br/ccivil_03/constituicao/congresso/DLG/DLG-186-2008.htm
- http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/decreto/d6949.htm
- 326 http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2009/Lei/L12008.htm
- http://www.planalto.gov.br/ccivil_03/leis/leis_2001/l10216.htm
- http://www.planalto.gov.br/ccivil_03/decreto/2002/D4360.htm
- ³²⁹ http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2009/Decreto/D7037.htm
- Brazilian Civil Code, Articles 1,740 to 1,766.
- Brazilian Civil Code, Article 1,548, item I.
- Brazilian Civil Code, Article 1,523.
- (a) Tutor is the person responsible for an underage person or an underage person with disabilities; (b) curator is the person responsible for a person with disabilities who is above 18 years old; (c) guardian is the person who has the guard of his/her underage kids capable or incapable. It is noteworthy that the guardian must be the parents or only the mother or only the father.
- Articles 22, 24, 26, 31 and 34 of the Brazilian Medical Ethics Code, issued by the Federal Council of Medicine as Resolution 1931/2009
- In other words, if someone has his/her absolute civil incapacity declared by a competent judge, the political rights of that person (mainly the right to vote and to run for public mandates and be voted) are suspended until the reasons giving rise to the civil incapacity declaration are gone. In order for someone to be declared as absolutely incapable of civil action, the material rules of the Brazilian Civil Code and the procedural rules of the Brazilian Civil Procedures Code have to be followed. These procedures are detailed elsewhere in our research, and include a Due Process of Law and the irrevocable right of defence to the person whose civil incapability is being required.

- Resolution 21920-4 of the Superior Electoral Court states, in a free translation, that: "Art. 1. Enrolment as voter and the exercise of the voting rights are mandatory for every person with disability. Sole Paragraph: No one will be subject to the imposition of penalties if a person has disability that makes it extremely difficult or impossible for him/her to exercise his/her electoral obligations, in terms of enrolment as voter and exercise of voting rights. Art. 2. The competent judge may, upon request of the citizen who matches the description in Art. 1 above, or his/her legal representatives or duly appointed attorney-in-fact, upon presentation of documents proving the disability of the citizen, issue a certification of good standing of electoral obligations for that person, with no expiration date".
- For instance in TRE-AL RECAN: 87 AL, 02/09/1992: Ability to be Elected. A person who is compulsorily retired due to labour incapacity is able to be voted for and elected, if such person has not been declared absolutely incapable as per the civil legislation. The candidate has full capacity to practise any and all acts of his/her political and civil life", Many other court decisions go in the same direction: (i) TRE-SE RECAND: 157 SE, 26/08/2002, (ii) TRE-PI REAP: 2418 PI, 09/11/2004, (iii) TRE-RS RREG RECURSO: 15005100 RS, 01/09/2000.
- Civil law is a local matter in Mexico; the laws and regulations may vary from one Federal Entity to another. Nevertheless, each Entity's Civil Codes are based on the Mexican Federal Civil Code; therefore, our analysis is based on such legal body.
- Article 450 section II
- ³⁴⁰ 18 years old.
- Mexican Constitution, Article 1st.
- And it is similar in each of the Mexican Federal Entities' Civil Codes.
- Mexican Federal Civil Code, Article 22.
- As set forth in Mexico City's Code of Civil Procedures, Articles 902, 904 and 905.
- ⁼ 18 years old.
- In Mexico, the term usufruct refers to the right to freely use and enjoy someone else's property.
- The Mexican General Law for the Inclusion of Disabled People provides guidelines to be followed by the private and public sector individuals and organisations to promote the inclusion of disabled people in a wide range of aspects.
- The Pro Persona Principle is contained in the Mexican Constitution and refers to the fundamental rights of all people consisting in the ;interpretation of laws and international treaties regarding human rights in a way that grants the person the widest protection. It is a tool to protect the human rights of the people in the strongest possible manner.

- Substitution principle refers to the a priori understanding regarding the legal acting of a person. It is understood that due to different causes the holder of a right has to act via legal representatives.
- Law No.4 Year 1997 on People with Disabilities (Law 4/1997).
- This is the understanding of the practice from information gained from the Ministry of Social Affairs and the Ministry of Health in Indonesia, and is not part of the legislation itself.
- Law No.19 Year 2011 on Ratification to Convention on the Rights of Persons with Disabilities (Law 19/2011).
- Articles 460 and 461 of the Indonesian Civil Code.
- Regulation of Ministry of Home Affairs No.461/1971/SJ.
- The concept of conservatorship under Indonesian law is similar to the concept of guardianship and is used when an adult is placed under guardianship.
- In addition, a person may be placed under conservatorship for "improvidence" which refers to "extravagance or overly consumptive". We have not examined this further in this note as it does not seem to be of relevance to persons with disabilities.
- Article 434 of the Indonesian Civil Code.
- Article 439 of the Indonesian Civil Code.
- Article 454 of the Indonesian Civil Code.
- Article 452 of the Indonesian Civil Code.
- Articles 5 and 6 of Law No. 4 Year 1997 on People with Disabilities (Law 4/1997).
- Article 14 of Law No. 4 Year 1997 on People with Disabilities (Law 4/1997).
- Articles 28 and 29, Law No. 4 Year 1997 on People with Disabilities.
- Law 4/1997 and Government Regulation No. 43 Year 1998 on Efforts to Increase the Social Welfare of Persons with Disabilities.
- According to Law No. 8 of 1999 on Consumer Protection ("Customer Protection Law"), consumer is each individual user of goods and/or services available in society, for the benefit of themselves, family members, other people and other living creatures, and which are not for trading.
- Article 4 letter (g) of Customer Protection Law.
- Law No. 4 Year 1997 on People with Disabilities.

- Article 14, Law No. 4 Year 1997 on People with Disabilities.
- Article 30, Government Regulation No. 43 Year 1008 on Efforts to Increase the Social Welfare of Persons with Disabilities.
- Wuri Handayani v. Head of Municipality of Surabaya and Head of Civil Employee Recruitment Committee of Municipality of Surabaya of 2004.
- Article 5, Law No. 13 Year 2003 on Manpower.
- Article 67, Law No. 13 Year 2003 on Manpower.
- Article 190, Law No. 13 Year 2003 on Manpower.
- Article 187, Law No. 13 Year 2003 on Manpower.
- Article 12, Law No. 4 Year 1997 on People with Disabilities.
- Law No. 36 of 2009 concerning Health.
- Circular Decree No. 395/KPU/V/2014 issued by the Public Election Commission.
- Law No. 8 Year 2012 on Public Election of Members of House of Representatives, Regional House of Representatives, and Regional Representative Council.
- Prinsloo's Curators Bonis v Crafford and Prinsloo 1905 TS 669.
- Theron v AA Life Assurance Association Ltd.
- ³⁸¹ S60(1) MHCA.
- Lange v Lange 1945 AD 332; Uys v Uys 1953 2 SA 1 (EDL).
- Section 5(4)(a) -(b) The Choice on Termination of Pregnancy Act 92 of 1996.
- Section 19(1) of the Children's Act.
- Section 20 of the Children's Act.
- Section 24 of PEPUDA.
- De Villiers and Another v Espach and another.
- Judin v Wedgwood and another.
- Section 15 of the MHCA.
- ³⁹⁰ Electoral Act 73 of 1998 Section 8(1)(c) -(d).
- The Constitution of the Republic of South Africa, Act 108 of 1996, Section 19(3)(b).

